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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BRYCE N. HARLOW and
ALEXANDER P. BUTTERFIELD,
Petitioners,

v.

A. ERNEST FITZGERALD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the district court's denial of petitioners' defense of immunity from civil damages is appealable under the exception to 28 U.S.C. § 1291 enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

2. Whether petitioners, as senior advisers to the President of the United States, should be subject to the risk of trial and civil damages from a person claiming injury from an adverse personnel decision of a federal executive department.

3. Whether the lower courts, in routinely requiring a trial upon the defense of qualified immunity, have thereby vitiated the defense and thwarted this Court's decision in *Butz v. Economou*, 438 U.S. 478, 507-08 (1978).

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A. ERNEST FITZGERALD,
Respondent.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Bryce N. Harlow and Alexander P. Butterfield petition this Court for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The district court's order of March 26, 1980 (App. A, *infra*, 1a-10a) denying the petitioners' motion for summary

[1] The only other party to this proceeding in the court of appeals was petitioners' co-defendant, Richard Nixon, who is separately represented and who filed on May 14, 1980 a petition to this Court for a writ of certiorari in this case, *Nixon v. Fitzgerald*, No. 79-1738.

judgment is not yet officially reported; neither is the order of the court of appeals granting respondent's motion to dismiss the appeal of the district court's order (App. B, *infra*, 11a-12a).

JURISDICTION

The district court's order denying petitioners' motion for summary judgment was entered on March 26, 1980 and was timely appealed to the United States Court of Appeals for the District of Columbia Circuit. Citing *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), as the dispositive law on the issue being appealed, respondent on April 14, 1980 filed a motion seeking either dismissal of the appeal or summary affirmance of the district court order. The motion to dismiss was granted on April 30, 1980 and a motion for rehearing was denied on July 14, 1980 (App. C, *infra*, 13a-14a). On October 4, 1980, the Chief Justice extended the time within which petitioners could file a petition for writ of certiorari through December 11, 1980. The jurisdiction of this court to review this case is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issue of appealability involves 28 U.S.C. § 1291. Respondent's claims, against which petitioners assert official immunity, are based upon the First Amendment, 5 U.S.C. § 7211 and 18 U.S.C. § 1505.[2] The texts of these Constitutional and statutory provisions are reprinted in Appendix D, *infra*.

STATEMENT OF THE CASE

This case presents for review an issue of critical importance to the effective functioning of government: the scope of immu-

[2] Mr. Fitzgerald's claim for relief under the District of Columbia common law, *see* App. A, *infra*, at 2a, has been abandoned. *See* Respondent's Supplemental Brief at 2 (May 14, 1980), *Nixon v. Fitzgerald*, No. 79-1738.

nity from civil damages of senior advisors to the President of the United States. The case grows out of a 1969 reorganization of the Department of the Air Force that resulted in the elimination of respondent's civil service position. Although his claims against Air Force officials have failed, respondent asserts that petitioners are liable in money damages for allegedly conspiring to arrange the job elimination and to obstruct any potential rehiring.

Petitioners' Roles in the White House.

Mr. Harlow served as President Nixon's top aide for Congressional matters and had broad authority from the President to contact government agencies and White House staff with regard to Congressional attitudes and strategy. His original title was Assistant to the President, but on November 4, 1969, as a reflection of broadened responsibilities, his role was given Cabinet-level status as Counsellor to the President. Since he was charged with helping to develop and advance the President's interests in a wide range of Congressional matters, Mr. Harlow had daily contact with other Cabinet members and typically received hundreds of telephone calls a day. Mr. Harlow served as Counsellor until December 9, 1970, and did not return to the White House until July 1, 1973, when he served again as Counsellor for a nine-month period until April 14, 1974.

Mr. Butterfield served as Deputy Assistant to the President and on November 4, 1969 assumed the additional post of Secretary to the Cabinet. He continued in both positions until March 14, 1973, when he became Administrator of the Federal Aviation Administration. Although not officially in a direct policy making position, as a procedural coordinator for policy development and deputy to the President's Chief of Staff, Mr. Butterfield was typically required to express his recommendations to the President and the President's principal assistants on many matters of White House concern.

Respondent's Loss of Employment.

In the closing days of the Johnson administration respondent A. Ernest Fitzgerald, a civilian cost analyst in the Department of the Air Force, testified to a Congressional committee on anticipated cost overruns on the Air Force's C-5A transport

plane. President Nixon's appointee as Air Force Secretary, Dr. Robert Seamans, wanted to reorganize the Department of the Air Force, one consequence of which would be to eliminate Mr. Fitzgerald's position. Knowing that Mr. Fitzgerald had ingratiated himself with some members of Congress, Dr. Seamans called Mr. Harlow on May 9, 1969 to inquire about possible repercussions on Capitol Hill if Mr. Fitzgerald's job were eliminated. Mr. Harlow's aide called back to say that it was "not a good time to cause trouble on the Hill."

Six months later, on November 3, 1969, and almost a year after Mr. Fitzgerald's testimony, Dr. Seamans announced an Air Force reorganization and "reduction in force." This plan entailed, among other things, the elimination of Mr. Fitzgerald's job. The decision to adopt the reorganization plan was reached by Dr. Seamans without any White House influence or involvement. As a courtesy to Mr. Harlow, Dr. Seamans called him the next day to inform him of the reorganization and its consequences. The elimination of Mr. Fitzgerald's position became effective on January 5, 1970. In anticipation of the President's being asked a question on the Fitzgerald matter at an upcoming press conference, the White House Press Office in January inquired of Mr. Butterfield as to whether the Administration had formulated a position on this matter. In response, Mr. Butterfield wrote a memo on January 20, 1970 to the White House Chief of Staff informing him of the inquiry. In the memo, Mr. Butterfield said that, since Mr. Fitzgerald should "be given very low marks in loyalty," the White House should not interfere with the Air Force's decision in the matter. The memo was not distributed to anyone in the Air Force or Defense Departments.

On January 20, 1970, Mr. Fitzgerald appealed his termination to the Civil Service Commission, and in late 1973, by order of the Commission, Mr. Fitzgerald was reinstated to a comparable Air Force position with back pay.[3] Although the

[3] After reinstatement, Mr. Fitzgerald filed another appeal with the Civil Service Commission claiming that his new position in the Department of the Air Force was not equivalent to his former position. After hearings, the Commission ruled that the reinstated position was equivalent, and Mr.

(*footnote continues*)

Commission found that the reduction in force and concomitant elimination of Mr. Fitzgerald's position were improperly based on personal factors unique to him, it also held that "the evidence of record does not support [Fitzgerald's] allegation that his position was abolished . . . in retaliation for his [Congressional] testimony." *Appeal of A. Ernest Fitzgerald* at 16 (Civil Service Comm., Sept. 18, 1973).

Respondent's Civil Suit.

This case began almost seven years ago. Claiming that the Commission's order was insufficient compensation, Mr. Fitzgerald initiated a civil action in federal district court in January, 1974 against Mr. Butterfield, Dr. Seamans, Secretary of Defense Melvin Laird, and other high-ranking Air Force and Defense Department officials, seeking compensatory and punitive damages for the allegedly retaliatory firing. The district court granted defendants' motion for summary judgment based on the statute of limitations, since the action had been commenced more than three years after Mr. Fitzgerald's job had been abolished. *Fitzgerald v. Seamans*, 384 F. Supp. 688 (D.D.C. 1974) (Gesell, J.). The court of appeals affirmed the summary judgment as to the Air Force and Defense Department defendants who were directly involved in the Fitzgerald matter. The dismissal was reversed only as to Mr. Butterfield on the ground that Mr. Fitzgerald had no reason to know prior to 1973 of any White House involvement in the decision to abolish his position. *Fitzgerald v. Seamans*, 553 F.2d 220 (D.C. Cir. 1977).

Following this reversal as to Mr. Butterfield, the parties embarked on extensive discovery proceedings, in the course of which it emerged that President Nixon and Mr. Harlow might

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(*footnote continued*)

Fitzgerald appealed this determination to the district court, where the case is still pending. *Fitzgerald v. Hampton*, Civ. No. 76-1486 (D.D.C.). That case is but one of a number of lawsuits, in addition to the instant one, commenced by Mr. Fitzgerald relating to the loss of his job. *See, e.g., Fitzgerald v. Staats*, 578 F. 2d 435 (D.C. Cir.), *cert. denied*, 439 U.S. 1004 (1978); *Fitzgerald v. United States Civil Service Commission*, 554 F.2d 1186 (D.C. Cir. 1977); *Fitzgerald v. Hampton*, 467 F. 2d 755 (D.C. Cir. 1972).

have been peripherally involved in the Fitzgerald matter. In September, 1978, the district court accordingly permitted the filing of a Second Amended Complaint adding President Nixon and Mr. Harlow as defendants.

Denial of Summary Judgment on the Immunity Issue.

Despite six years of discovery, Mr. Fitzgerald failed to uncover any evidence showing that petitioners had in any way initiated or approved the Air Force reorganization or had initiated any contact with the Air Force or Defense Departments regarding the Fitzgerald matter. Accordingly, following the close of the protracted liability discovery, the petitioners moved again for summary judgment, on the grounds, *inter alia*, that a grant of absolute immunity was "essential for the conduct of the public business," under *Butz v. Economou*, 438 U.S. 478, 507 (1978), or alternatively, that they were entitled to qualified immunity under *Butz* because Mr. Fitzgerald had failed to show any evidence of malice or bad faith on the part of petitioners.

On March 26, 1980, the district court, citing *Halperin v. Kissinger*, 606 F. 2d 1192 (D.C. Cir. 1979), *cert. granted*, 446 U.S. 951 (1980) (No. 79-880), as the controlling law in the Circuit, denied petitioners' motion for summary judgment. App. A. at 2a-3a. Rejecting petitioners' claim of absolute immunity, the district court ruled that since "[g]enuine issues of fact remain" as to (among other things) the question of malice and bad faith, the claim of qualified immunity must be submitted to the jury. *Id.*

The petitioners appealed the district court's rejection of their immunity defense to the court of appeals; the respondent filed a motion alternatively seeking dismissal of the appeal or summary affirmance of the district court's order. The court of appeals, without stating the basis for its decisions, on April 30, 1980 granted respondent's motion to dismiss the appeal, and on July 14, 1980 denied petitioners' petition for rehearing and suggestion for rehearing *en banc*. App. C, *infra*, 13a-14a.

In refusing to rule on petitioners' claim of qualified immunity, as mandated by this Court in *Butz*, the district court has

effectively deprived petitioners of this defense, since the very premise of any immunity defense is that the case "need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity." *Butz v. Economou, supra,* 438 U.S. at 508.

REASONS FOR ALLOWANCE OF THE WRIT

This case warrants review by this Court to resolve conflicting rulings by the district and circuit courts that threaten to undermine the defenses of absolute and qualified immunity recognized by this Court in *Butz* as "essential for the conduct of the public business." *Id.* at 507.

Specifically, the court of appeals' dismissal of petitioners' appeal on the apparent ground that the district court's denial of summary judgment on the immunity issue was not appealable, is contrary to the decisions of this Court and other courts of appeals.

Moreover, the Court is presented here with an opportunity to address two important aspects of immunity not resolved by its decision in *Butz*. First, this case adds a significant dimension to the claims of absolute immunity of the President and senior Presidential advisers asserted in the separate petition in this case filed by President Nixon (No. 79-1738) and in *Halperin v. Kissinger, supra,* in which this Court has already granted certiorari (No. 79-880).[4] Second, this case affords an opportunity to clarify the role of the lower courts in ruling upon pretrial motions based on qualified immunity. Numerous decisions of the lower courts in this and other cases have demonstrated that such clarification is essential if the defense of qualified immunity is to have any vitality.

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[4] In June, 1980, petitioners (at the time represented by the Solicitor General) filed a Memorandum with this Court requesting that it hold Nixon's petition in this case (No. 79-1738) pending the Court's decision in *Kissinger v. Halperin, cert. granted,* 446 U.S. 951 (1980) (No. 79-880).

I. The Denial of the Immunity Defenses Was a Final, Collateral Order, Appealable under *Cohen v. Beneficial Industrial Loan Corp.*

Since this Court's 1949 decision in *Cohen v. Beneficial Industrial Loan Corp.*, it has been recognized that the grant of jurisdiction afforded the courts of appeals to review "final decisions of the district courts" under 28 U.S.C.§ 1291 is to be given a "practical rather than a technical construction." 337 U.S. 541, 546 (1949). Accordingly, under the *Cohen* exception to § 1291 as recently summarized by this Court in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69 (1978), pre-judgment orders of the district courts may be appealed if they (i) conclusively determine the disputed question, (ii) resolve an important question completely separate from the merits of the action, and (iii) are effectively unreviewable on appeal from a final judgment.

In recent years this Court has on at least two occasions expressly held that denials of immunity defenses are appealable under the *Cohen* collateral order doctrine. *Helstoski v. Meanor*, 442 U.S. 500 (1979) (immunity under the Speech and Debate Clause); *Abney v. United States*, 431 U.S. 651 (1977) (immunity on ground of double jeopardy). Moreover, until the court of appeals dismissal in this case, the courts of appeals that had considered precisely this issue had unequivocally ruled that, in the words of the Third Circuit, a pre-trial

> denial of the defendants' motions for summary judgment on the issue of absolute immunity is appealable under the *Cohen* collateral order doctrine. Appellate review . . . [prior to trial] will conclusively determine the disputed question and will resolve an important issue completely separate from and collateral to the question of the defendants' guilt or innocence. Moreover, the denial of absolute immunity is effectively unreviewable on appeal. *Since the right which absolute immunity protects is the right not to be subjected to trial, it is irretrievably lost if appellate review must await final adjudication on the merits.* [*Forsyth v. Kleindienst*, 599 F.2d 1203, 1208-09 (3d Cir. 1979),

petition for cert. pending sub nom. Mitchell v. Forsyth, No. 79-1120 (filed Jan. 18, 1980) (assertion of absolute immunity by Executive Branch officials) (emphasis added).]

The Second Circuit is in accord with the Third on the issue, having recently denied a plaintiff's motion to dismiss an appeal of a pre-trial denial of an immunity defense. *Clark v. United States,* 624 F.2d 3, 4 (2d Cir. 1980) (briefing permitted by court of appeals on claim of immunity by former President Nixon; appeal stayed pending this Court's decision in *Halperin*). Finally, other panels of the District of Columbia Circuit itself have expressly recognized the immediate appealability under *Cohen* of a district court's denial of an immunity defense. *See Briggs v. Goodwin,* 569 F. 2d 10 (D.C. Cir. 1977), *cert. denied,* 437 U.S. 904 (1978) (assertion of witness and prosecutorial immunity); *McSurely v. McClellan,* 521 F.2d 1024 (1975), *aff'd in pertinent part en banc,* 553 F.2d 1277, 1283-84 n.18 (D.C. Cir. 1977), *cert. dismissed,* 438 U.S. 189 (1978) (immunity under Speech and Debate Clause). The court in *Briggs* recognized that since

> *the purpose behind absolute immunity is as much to protect the relevant persons from a trial on their actions* as it is to protect them from the outcome of trial .... [T]he full protection of absolute immunity would be irreparably lost if review had to await final judgment. [569 F.2d at 59 (emphasis added).]

In refusing to review the district court's denial of petitioners' immunity claim,[5] the appellate court in this case must have ignored this Court's holdings in *Helstoski* and *Abney* as to appealability of immunity denials. As the court's dismissal was in conflict with this Court's decisions, and with the rulings on the very point by two other circuits and other panels of the

[5] As previously noted, p. 6, *supra,* respondent had moved alternatively for summary affirmance or for dismissal of the appeal of the district court order. Since the court of appeals expressly dismissed, it obviously did *not* decide as a matter of law that petitioners were not entitled to immunity (presumably, had it desired to do so, it would have affirmed); it simply ruled that the issue could not be appealed.

District of Columbia Circuit itself, it is especially imperative that this Court exercise its supervisory powers to review the court of appeals decision.[6]

II. This Case Presents an "Exceptional Situation" Where "Absolute Immunity Is Essential for the Conduct of the Public Business" under *Butz v. Economou.*

While the scope of immunity to be accorded Presidential advisers is now being considered by this Court in *Halperin,*[7] this case presents the issue in a significantly different context, one which draws into focus the difficulties experienced by the lower courts and defendants therein in the wake of this Court's decision in *Butz.* Indeed (as discussed in Point III, *infra*), this case, perhaps more clearly than *Halperin,* illustrates how the Court's expectations in *Butz* have not been fulfilled.

In *Butz,* which involved a damage claim for allegedly improper initiation of administrative proceedings by the Department of Agriculture against a registered commodity futures commission merchant, the defendants unsuccessfully sought to invoke the absolute immunity granted in *Barr v. Matteo,* 360 U.S. 564 (1959). In the *Barr* case this Court had held that a federal official who was acting "within the outer perimeter of [his] line of duty" was absolutely immune from civil action on a state tort claim. 360 U.S. at 575. However, in *Butz* the Court reasoned that since state officials were liable by reason of 42 U.S.C. § 1983 for civil damages for constitutional

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[6] That this Court has the authority under 28 U.S.C. §1254 to grant a writ of *certiorari* in this case is beyond question. Respondent has argued in this Court that this case was not "in" the court of appeals (within the meaning of §1254), "because that court had granted respondent's motion to dismiss for lack of jurisdiction." Brief for Respondent in Opposition at 2, *Nixon v. Fitzgerald,* No. 79-1738. Respondent's concept that this Court has no power to review a court of appeals dismissal for want of jurisdiction is clearly erroneous. *See, e.g., Gardner v. Westinghouse Broadcasting Co.,* 437 U.S. 478 (1978) (certiorari granted to review jurisdictional dismissal by court of appeals).

[7] Petitioners adopt the arguments of the Solicitor General in his Brief for Petitioners, *Kissinger v. Halperin, cert. granted,* 446 U.S. 951 (1980) (No. 79-880), insofar as the same concern the immunity of Presidential advisers.

deprivations, it would be anomalous if federal officials were held to be immune for similar violations. Accordingly, the Court held that

> in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to ... qualified immunity ..., subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business. [*Butz v. Economou, supra,* 438 U.S. at 507.]

This qualified immunity will be allowed under *Butz* unless the plaintiff can establish (i) that the defendant had no reasonable grounds to believe his action was legal, or (ii) that the defendant acted with malice or bad faith. *Id.* at 497-98, *citing Scheuer v. Rhodes,* 416 U.S. 232, 247-48 (1974).

Decisions on official immunity always involve resolution of the tension between the need for immunity as an essential element for effective functioning of government, and the desire to afford a remedy to persons injured by the acts of public officials. Although the policy underlying immunity is almost self-evident, the words of Judge Learned Hand in this regard are enlightening:

> The justification for . . . [granting immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. [*Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied,* 339 U.S. 949 (1950).]

The outcome of attempting to balance immunity for public officials on the one hand, and the vindication of private rights on the other, depends on the weight to be accorded one interest over the other in each circumstance. In the case of prosecutors,

judges and officials exercising quasi-judicial functions, the rationale for immunity has been thought so compelling that these officials have been granted absolute immunity from claims arising under both state law and the Constitution. *Butz v. Economou, supra,* 438 U.S. at 508-17. Indeed, *Butz* extended absolute immunity even to civil service hearing examiners and agency attorneys participating in federal administrative proceedings, on the ground that their positions were "functionally comparable" to those of a judge and prosecutor. *Id.* at 513, 517. In so holding, this Court has recognized the necessity for absolute immunity for public officials involved in the judicial or quasi-judicial processes essentially because of the inhibiting effect the prospect of civil liability might have upon such officials, who are highly visible and exposed to vindictive suits by persons believing they are aggrieved by the officials' performance of their public duties. *Id.* at 508-12.

It is respectfully submitted that the same exigencies that have led this Court to recognize the necessity for absolute immunity for judges and subordinate judicial officials mandate extension of absolute immunity to the President and his senior advisers. The President and his principal advisers obviously are far more exposed to the public than officials in the judicial branch, and their actions or inactions have at least as direct and far-reaching an impact on persons in our society as decisions of judges and prosecutors. Experience has now demonstrated that the President and his senior advisers, such as petitioners here, are as exposed to vindictive or retaliatory litigation as are members of the judiciary.

Advisers to the President of the United States do not of course exercise a quasi-judicial function. The obvious necessity, however, for the flow of information and advice to the President and among members of his staff, unfettered by "the constant dread of retaliation," *Gregoire v. Biddle, supra,* 177 F.2d at 581, is at least as compelling as the need to protect the discretion of officials performing judicial or quasi-judicial functions. Many, if not most, of the matters reaching the White House come to it from an executive department. It is thus an essential function of a Presidential adviser to decide which matters warrant review by the White House staff and the

President himself, as well as to suggest a decision on the merits. In short, the senior White House adviser is daily called upon to "second guess" decisions of executive departments. It is hard to see why this function, with its manifest need for wide-ranging discretion and with its propensity to provoke retaliatory suits by those dissatisfied with the manner of its exercise, should be ranked behind that of officials performing prosecutorial or quasi-judicial functions.

Just as the possibility of anything less than absolute immunity for judicial and prosecutorial officals would have "an adverse effect," *Butz v. Economou, supra,* 438 U.S. at 510, on the judicial system, so too would the elimination of absolute immunity for senior Presidential advisers have an inhibiting effect on the flow of information and ideas within the White House. "It simply defies logic and common experience to suggest that officials will not have [the fear of litigation] in the back of their minds when considering what official course to pursue."[8] *Id.* at 526-27 (Rehnquist, J., concurring and dissenting in part). The Court has previously recognized the affirmative need for the President to obtain uninhibited advice from his senior staff:

> The President's need for complete candor and objectivity from advisers calls for great deference from the courts.
>
> . . .
>
> . . . [There is a] necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking . . . . [T]hose who assist the [President] must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These . . . considerations . . . [are] fundamental to the operation of Government and are

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[8] Indeed, in the instant case, respondent seeks in excess of $500,000 in compensatory damages and $3,000,000 in punitive damages. The district court has observed that, if respondent were able to prove his allegations, "there are heavy punitive damages here that [a jury] could award. They could award ten million dollars against Butterfield." Transcript of Pretrial Conference of May 16, 1980 at 157, *Fitzgerald v. Butterfield et al.* (D.D.C.) (Gesell, J.).

inextricably rooted in the separation of powers under the Constitution. [*United States v. Nixon*, 418 U.S. 683, 706, 708 (1974) (privilege for confidential Presidential communications is subordinate only to specific need in criminal prosecution).]

Accordingly, in view of the special function of high-level White House advisers who every day deal with matters of critical importance to the nation, their position should be recognized as one of "those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Butz v. Economou, supra*, 438 U.S. at 507 (footnote omitted).[9]

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[9] This conclusion is especially warranted here, because one of the reasons advanced by *Butz* for limiting absolute immunity of federal officials—that those who have experienced constitutional deprivations at the hands of federal officials should not be left remediless—is not present in this case. *See Butz v. Economou, supra*, 438 U.S. at 504-06. It can hardly be said that granting petitioners immunity would leave Mr. Fitzgerald remediless. As evidenced by his reinstatement with back pay by order of the Civil Service Commission, he has successfully availed himself of the statutory scheme for federal civil servants injured by improper personnel decisions. Accordingly, in view of the statutory and administrative remedies typically available to redress alleged constitutional torts arising from White House review of an executive department's decisions, allowing absolute immunity in these situations will not leave plaintiffs remediless.

Indeed, in view of the availability of the statutory remedy for respondent, there even is considerable question as to whether he may maintain an implied right of action on the constitutional claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *See Bush v. Lucas*, 598 F. 2d 958, *rehearing denied*, 605 F. 2d 554 (5th Cir. 1979), *vacated and remanded*, 446 U.S. 914 (1980) (mem.) (no *Bivens* cause of action available where federal employee, injured by retaliatory demotion, could pursue administrative remedies). *But cf. Carlson v. Green*, 446 U.S. 14 (1980) (availability of recovery under Federal Tort Claims Act does not preclude *Bivens* action for wrongful death against federal official). The issue of whether respondent could maintain this action in view of the existence of a comprehensive statutory remedy was briefed in the district court in this case, but as the denial of summary judgment on the issue was not immediately appealable under the *Cohen* collateral order doctrine, it was not included in petitioners' notices of appeals to the court of appeals.

III. The Lower Courts Have Unduly Restricted the Defense of Qualified Immunity Envisioned in *Butz v. Economou*, by Routinely Submitting the Issue to Trial.

If senior Presidential advisers faced with allegations of unconstitutional conduct, such as petitioners here, are deemed not entitled to absolute immunity, because their duties as public officials do not constitute a "special function requir[ing] a full exemption from liability," then they will be accorded only qualified immunity. *Butz v. Economou, supra,* 438 U.S. at 507-08. In so holding, the Court asserted that the "principle of only qualified immunity for constitutional violations . . . should prove . . . workable" because the key purpose of immunity (whether absolute or qualified)—to avoid a trial on the merits—would be achieved by summary disposition of unsupported claims. *Id.* Thus, the majority in *Butz* counseled the lower courts:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. . . . [D]amages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity . . . . In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits. [*Id.*]

Unfortunately, the lower courts have plainly misinterpreted this mandate to dismiss cases where appropriate before trial on the qualified immunity defense, and have generally declined to rule on motions for summary judgment on the ground that the claim of malice or bad faith automatically raises a triable issue of fact as to the defendant's state of mind that must be resolved by a jury. The lower courts have treated a plaintiff's mere allegation of malice (occasionally supported by some circumstantial inference) as creating a triable issue of fact sufficient to bar a defendant's motion for summary judgment. It was on this basis that the district court in this case denied petitioners' motion for judgment before a trial on the issue of qualified immunity, and the same result has been

reached in numerous other cases since the *Butz* decision. *See Clark v. United States,* 481 F. Supp. 1086, 1092-93 n.5 (S.D.N.Y. 1979), *appeal dismissed in part and stayed in part,* 624 F.2d 3, 4 (2d Cir. 1980) (mere pleading of malice sufficient to prevent dismissal on qualified immunity ground). *See generally Halperin v. Kissinger,* 606 F.2d 1192 (D.C. Cir. 1979), *cert. granted,* 446 U.S. 951 (1980); *Forsyth v. Kleindienst,* 599 F.2d 1203 (3d Cir. 1979), *petition for cert. pending sub nom. Mitchell v. Forsyth,* No. 79-1120 (filed January 18, 1980); *Smith v. Nixon,* 606 F.2d 1183 (D.C. Cir. 1979), *petition for cert. pending,* No. 79-882 (filed Dec. 7, 1979); *Zweibon v. Mitchell,* 606 F.2d 1172 (D.C. Cir. 1979), *petition for cert. pending,* No. 79-881 (filed Dec. 7, 1979); *Dellums v. Powell,* 490 F. Supp. 70 (D.D.C. 1980).

Judging by their insistence on letting the jury pass upon assertions of qualified immunity, the lower courts have seemingly viewed this Court's opinion in *Butz* as stating "that anytime a plaintiff can paint his grievance in constitutional colors," the defendant will be forced to undergo trial. *Butz v. Economou, supra,* 438 U.S. at 520 (Rehnquist, J., concurring and dissenting in part).

Sitting by designation on the appellate panel, Judge Gesell, the district judge who denied petitioners' motion for summary judgment in this case, pointed out in his concurring opinion in *Halperin v. Kissinger, supra,* that whatever protection was to be afforded by qualified immunity had in fact been rendered almost meaningless:

> If a plaintiff can establish a genuine material issue of fact as to any element of the immunity defense the case will have to proceed to trial. In my view this approach substantially undermines, if not destroys, the immunity doctrine.
>
> . . .
>
> Each suit almost invariably results in officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discovery is wide-

> ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient. In short, if these standards are those to be followed in these cases, trial judges will almost automatically have to send such cases to full trials on the merits. [*Halperin v. Kissinger, supra,* 606 F.2d at 1214 (Gesell, J., concurring).]

The instant case is itself an unfortunate and egregious example of how the Court's admonitions in *Butz* to "weed out insubstantial claims," *Butz v. Economou, supra,* 438 U.S. at 527, have proven inadequate. After almost seven years of litigation, and after the close of exhaustive discovery involving countless depositions, Mr. Fitzgerald has been unable to uncover any evidence whatever establishing that petitioners had a part in the decision to eliminate his job or the decision not to rehire him. There is no evidence of a conspiracy to these ends. Yet petitioners have been denied summary judgment because Judge Gesell felt himself bound by the controlling precedent in the District of Columbia Circuit, *Halperin v. Kissinger, supra.* But for that precedent, the inference is inescapable, in light of his concurring opinion in *Halperin,* that he would have granted petitioners' motion.

To give life to the doctrine of qualified immunity, petitioners urge that the Court recognize that as a practical matter the scheme contemplated in *Butz* has not been followed. The exercise by this Court of its supervisory powers over the federal judicial system is necessary to correct this misunderstanding, to reemphasize the need for appropriate use of summary disposition of qualified immunity claims, and to clarify the circumstances under which summary judgment for a defendant must be granted as a matter of law.

In his previously quoted concurring opinion, Judge Gesell suggested a possible approach to remedying the lower courts' misapplication of *Butz*:

> In order to give the immunity doctrine some genuine force and effect, it appears to me that a plaintiff should be required to make a stronger showing than the Court's opinion requires on the immunity question before being permitted to proceed to trial. I would hold that the plaintiff must establish after the completion of discovery and before the trial commences, not merely the existence of a genuine dispute as to some material issue of fact but also, by the preponderance of the evidence or through clear and convincing evidence, that the official failed to act with subjective or objective good faith. [*Halperin v. Kissinger, supra,* 606 F.2d at 1215 (Gesell, J., concurring).]

If Judge Gesell's suggestions were adopted, a judge would make an ultimate finding of fact on the issue of qualified immunity in accordance with the prescribed evidentiary standard.[10] If the judge found the evidence insufficient to satisfy this standard, the defense of qualified immunity would prevail and summary judgment would be granted. A finding that the evidence satisfied the evidentiary standard could be treated in one of two ways: either this finding could be regarded as a final determination that the defense was not available, in which event only those elements of plaintiff's case other than the immunity issue would go to trial, or the finding could be regarded as simply deciding that the trial should go forward, in which case a determination of the immunity issue would be made *de novo* by the jury. While either of these courses would prevent the misapplication of *Butz,* the requirement that a district judge make an ultimate finding of fact at the pre-trial stage poses potential difficulties.

Accordingly, as an alternative, it would be sufficient for purposes of satisfying the *Butz* admonition for summary disposition to require simply that, on the motion for summary judgment, the judge must determine whether the credible evidence uncovered by the discovery process adds up to a

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[10] This type of pre-trial determination by the judge of mixed legal and factual questions is of course not uncommon. *See, e.g.,* Fed. R. Civ. Pro. 23(c); Fed R. Evid. 104(a) and Advisory Committee note thereto.

substantial showing that the defendants were implicated in the alleged constitutional tort.[11] The difference between this approach[12] and that suggested by Judge Gesell is that the court would be applying a legal standard of sufficiency for the purpose of determining whether or not the trial should go forward, rather than making an ultimate finding of fact. Accordingly, since this approach would give meaning to the qualified immunity defense and avoid the difficulties inherent in pre-trial determinations of fact, petitioners urge the Court to instruct the lower courts that *where the plaintiff has not established after discovery a quantum of evidence sufficient (in view of immunity's purpose of avoiding a trial) to warrant putting the issue to a trial, the judge must grant summary judgment on the ground of qualified immunity.*

Under this suggested standard, in view of the remoteness of petitioners' position from the Air Force Department that made the decision to eliminate Mr. Fitzgerald's job, the absence on the record of any evidence of malice, and the complete lack of evidence linking petitioners with the decision to adopt the Air Force reorganization plan, it should be clear that *as a matter of law* petitioners ought not, on this type of record, be forced to put any issue here to a trial. When this "thin" record is weighed against the fact that Mr. Fitzgerald

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[11] While this Court has expressly resolved the issue of who has the burden of pleading good or bad faith when qualified immunity is raised as a defense, *see Gomez v. Toledo*, 446 U.S. 635 (1980), this Court has not answered the question of who must bear the ultimate burden of persuasion. The decisions of the Courts of Appeals are in conflict on this question. *Compare Gaffney v. Silk*, 488 F.2d 1248, 1250-51 (1st Cir. 1973) *with McCray v. Burrell*, 516 F.2d 357, 370 (4th Cir. 1975), *cert. dismissed*, 426 U.S. 471 (1976). Thus, the instant case also presents an opportunity for this Court to resolve that conflict and determine what the ultimate burden of persuasion should be.

[12] If the Court establishes the suggested rule of law requiring judges to grant summary judgment on the ground of qualified immunity in appropriate cases, it would follow that a ruling by a district court judge on such a motion would be immediately appealable as a collateral order under the three-part test of *Cohen* discussed in Point I, *supra*. Since the key function of any immunity defense—whether absolute or qualified—is to avoid a trial on the merits, a pre-trial denial of qualified immunity, no less than a denial of absolute immunity, must be immediately appealable.

has successfully availed himself of the very remedy established by Congress to redress the alleged injury, the above conclusion is even more forcefully warranted.

Accordingly, if they are not deemed entitled to absolute immunity under the "special functions" category of *Butz v. Economou, supra*, 438 U.S. at 508, then petitioners request the Court to clarify its rule in *Butz* for the benefit of the lower courts and the federal officials who are the targets of similar suits, to the end that where the prospect of proof of the allegations against defendants is as attenuated as it is in this case against petitioners, summary judgment for defendants on the ground of qualified immunity must be awarded.

CONCLUSION

In view of the erroneous dismissal of petitioners' appeal by the court of appeals and the erroneous denial by the district court of petitioners' motion for summary judgment on the ground of official immunity, the Court should allow the writ of *certiorari*.

As suggested by petitioners in their Memorandum of June 1980 filed in connection with President Nixon's petition for a writ of *certiorari* in this case (No. 79-1738), the Court may wish to consider this case in connection with *Halperin*. Should the Court find the defendants in *Halperin* entitled to absolute immunity, the Court might appropriately grant *certiorari* here and dispose of this case by means of a summary disposition on the merits in light of its *Halperin* decision. Alternatively, should the Court find that the defendants in *Halperin* are not to be accorded absolute immunity or that it is unnecessary to reach the immunity issue, petitioners respectfully submit that the Court should grant this petition in order to resolve conflicting lower court rulings and to give full effect to its decision in *Butz v. Economou*.

Respectfully submitted,

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December 11, 1980

APPENDICES

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-178
[Filed Mar 26 1980]

A. ERNEST FITZGERALD,

Plaintiff,

v.

ALEXANDER P. BUTTERFIELD, et al.,

Defendants.

ORDER

Upon consideration of defendants' motions for summary judgment, the opposition thereto, and the entire record herein, it is hereby

ORDERED that defendants' motions are denied in the following respects:

A. Causes of Action

For reasons set forth more fully in the Court's Order of April 27, 1979, plaintiff has stated the following triable causes of action against each of the three defendants.

1. Plaintiff states a cause of action for damages under the First Amendment to the United States Constitution based on defendants' alleged retaliation for plaintiff's having exercised his rights of free speech and petition.

2. Plaintiff states a cause of action for damages under 5 U.S.C. § 7211 (1976 & Supp. II, 1978).

3. Plaintiff states a cause of action for damages under 18 U.S.C. § 1505.

4. Plaintiff states a cause of action under District of Columbia law for intentional infliction of mental distress by extreme and outrageous conduct.

5. Plaintiff states a cause of action under District of Columbia law for intentional interference with (existent and prospective) economic advantage.

The gravamen of the alleged conspiracy is the participants' knowing intent to terminate plaintiff's employment with the Air Force and to prevent his reinstatement as a government employee in retaliation for his congressional testimony. Summary judgment for a defendant at this stage requires him to show either that he lacked knowledge that the adverse personnel actions taken were retaliatory, or that he lacked an intent to approve this specific aspect of government conduct, or that he took no action in furtherance of such a dismissal and/or obstruction. Plaintiff has established genuine issues of fact as to each of these matters regarding the conduct of all three defendants. Thus, these are issues for the jury to resolve.

B. Immunity

Absolute immunity is not available either to defendant Nixon as a former President or to defendants Harlow and Butterfield. *Butz v. Economou*, 438 U.S. 478 (1978); *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3467 (Dec. 7, 1979). In order to establish qualified immunity, each defendant must show that he was acting "within the outer perimeters" of his responsibilities, that any action taken was performed without malicious intent to deprive plaintiff of constitutional or other rights, and that it was reasonable to believe that any action taken was legal. *Butz v. Economou*, *supra*; *Halperin v. Kissinger*, *supra*. *See Wood v. Strickland*, 420 U.S.

308 (1975). Genuine issues of fact remain as to the scope of each defendant's responsibilities, the objective reasonableness of any beliefs each may have had concerning the legality of his alleged conduct in the Fitzgerald matter, and the subjective good faith underlying such conduct.

In analyzing the reasonableness of defendants' beliefs as predicates to the alleged wrongful conduct, the Court has considered the unique demands placed on the time and energies of defendant Nixon as President. *Scheuer v. Rhodes*, 416 U.S. 232, 247-49 (1974); *Halperin v. Kissinger*, *supra*, 606 F.2d at 1212-13. There is, however, ample evidence in the record that Fitzgerald's predicament was not simply one of a disgruntled civil servant. Both members of Congress and the press identified plaintiff's case as being of great public importance throughout 1969. Factual circumstances surrounding his termination were repeatedly raised for the President's attention. Moreover, the conduct complained of has long been prohibited by criminal statute, a statute to which Mr. Nixon personally gave strong support while a member of the United States Senate. The Court is unable to conclude at this time that Nixon's beliefs regarding any alleged failure to meet a statutory or constitutional obligation imposed on him were reasonable as a matter of law.

C. Punitive Damages

Punitive damages may be awarded against any defendant whose actions in contravention of statutory or common law have been shown to be malicious or in reckless disregard for the rights of others. *Knippen v. Ford Motor Co.*, 546 F.2d 993, 1002 (D.C. Cir. 1976); *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527, 549-51 (D.C. Cir. 1975), *reversed on other grounds*, 426 U.S.

290 (1976). Because genuine issues of fact remain with respect to the subjective good faith underlying each defendant's conduct, it has not been established that such damages are unavailable as a matter of law. Should the facts of this case developed at trial warrant an award of punitive damages, such an award would be recoverable at common law or under plaintiff's statutory claims. A similar recovery based on any finding of First Amendment violations does not appear to be constitutionally interdicted. *See generally Dellums v. Powell*, 566 F.2d 167, 209 (D.C. Cir. 1977) (Leventhal, J. concurring); *Payne v. Government of Dist. of Columbia*, 559 F.2d 809, 827-27 (Tamm, J. concurring).

D. Statute of Limitations

The motions based on the Statute of Limitations are denied for reasons set forth in a separate Memorandum filed herewith.

It is further

ORDERED that defendants' motions for summary judgment are granted in the following respects:

1. Plaintiff having voluntarily withdrawn his claim under the Fifth Amendment to the United States Constitution, this claim is hereby dismissed.

2. Plaintiff having withdrawn his contention that defendants are in any way liable in connection with initiating the 1969 investigation of him by the Air Force Office of Special Investigations ("OSI"), this matter shall not be prosecuted at trial. Evidence regarding the subsequent use of OSI investigation results or charges shall not be admissible at trial absent a clear showing of relevance and good cause.

It is further

ORDERED that the dates and times for pretrials and trials as set by this Court's Order of November 19,

1979, are modified to reflect a change in the time of Pretrial No. 2 and the date of the trial:

First Pretrial: May 2, 9:30 a.m.
Second Pretrial: May 12, at *2:00* p.m.
Final Pretrial: May 22, at 9:30 a.m.
Trial: June *4*, at 9:30 a.m.

/s/ Gerhard A. Gesell
United States District Judge

March 26, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-178

[Filed Mar 26 1980]

A. ERNEST FITZGERALD,

Plaintiff,

v.

ALEXANDER P. BUTTERFIELD, et al.,

Defendants.

MEMORANDUM REGARDING STATUTE OF LIMITATIONS

Plaintiff, a former Air Force weapon systems analyst, seeks relief against former President Nixon and two White House associates in this civil conspiracy damages action stemming from his discharge in 1969. Following years of litigation against a dwindling number of government officials, the Court has for consideration separate motions for summary judgment made on behalf of these three remaining defendants. On the basis of exhaustive discovery, defendants individually claim that plaintiff is barred from proceeding by the applicable three-year Statute of Limitations, D.C. Code § 12-301(8) (1973).

One defendant, Butterfield, was previously dismissed by reason of the Statute of Limitations but reinstated after a protracted appeal, *Fitzgerald v. Seamans*, 553 F.2d 220, (D.C. Cir. 1977). Following remand, defendants Nixon and Harlow were added and the cause of action given greater specificity by a Second Amended Complaint filed September 14, 1978. After limited discovery, the Court on April 27, 1979, denied motions for summary judgment addressed to the Statute of

Limitations issue. It was, however, recognized that further consideration of this vexing issue might eventuate following the additional detailed discovery that has since ensued. The present motions were thoroughly briefed and fully argued upon completion of discovery and preliminary to a series of noticed pretrials that will precede trial in June.

In dealing with these motions this Court is governed by the mandate from the Court of Appeals. Plaintiff's original complaint seeking damages against representatives of the Air Force was found to be time-barred, but, on remand, Butterfield survived as a defendant. The Court of Appeals held that Butterfield, a member of the White House staff, was "a person of influence in a different center of power." Although he was alleged to have conspired with the Air Force defendants, he was held for trial because the record before the appellate court did not compel the view that plaintiff should have been aware of "White House deliberations concerning his government employment" prior to1973. The Court of Appeals recognized that while new Air Force defendants could not be added plaintiff could, by reason of his John Doe allegations, add new White House defendants "subject to the requirement of due diligence." It also was noted that Butterfield's own involvement could be re-examined upon a fuller factual record in the light of the due diligence standard.

As the action now stands, plaintiff proposes to proceed against the three movants, all participants in the White House "center of power." He claims that they conspired with Air Force representatives and with others in the White House to bring about his dismissal by the Air Force and to block his reinstatement to government service in the immediate aftermath of the termination.

Discovery into White House involvement was effectively curtailed in the spring of 1974, following early summary judgment motions from the Air Force defendants. Plaintiff's first meaningful opportunity to resume his inquiries on this score came after remand, and it is not seriously disputed that he proceeded with due diligence from that point. Defendants focus instead on the three-year period following the final events fixing alleged liability, which occurred early in 1970. They argue that by early 1973, plaintiff was on clear notice of facts and circumstances enabling him intelligently to prosecute his cause of action. His failure to proceed at that time is said to bar this action against any White House officials, including the President.

An assessment of plaintiff's diligence in ferreting out White House involvement must take account of the appellate court's conclusion that plaintiff was thwarted by the Air Force's successful claim of executive privilege. The privilege, invoked by Secretary Seamans before the Civil Service Commission when inquiry was directed toward White House participants, could only have been authorized by or on behalf of the President. In other respects, plaintiff's inquiries also have been frustrated or ignored in the interests of White House secrecy.

There is still no proof that plaintiff could have proceeded more diligently against Butterfield. Although Butterfield did nothing himself to conceal his involvement, his alleged participation was not even suspected until his memorandum surfaced during the Senate Watergate hearings in the summer of 1973. Having been shielded from plaintiff's inquiries by the broad mantle of White House secrecy, he was promptly and responsibly joined as a defendant once his presence became known.

In contrast, Harlow's involvement in plaintiff's situation was suspected shortly after the termination.

But as far as Harlow's participation in the conspiracy is concerned, there was no conduct known to plaintiff indicating that he may have affirmatively urged termination or prevented reinstatement to government service. Indeed, plaintiff's prime source of information during this time, Mollenhoff, apparently considered Harlow an ally. Although the evidence is disputed, active concealment by Harlow can be implied on plaintiff's version of the facts. Only much later was plaintiff able to discover what he now alleges was Harlow's true role as part of the conspiracy.

Turning to former President Nixon, the Court confronts a mass of contradictory proof. It is essential in applying the law of diligence to avoid an examination of the proof with hindsight, distorted by subsequent revelations of White House prevarications and duplicity. Undeniably, plaintiff confronted some indicia of "White House involvement" by early 1973, and he voiced certain suspicions concerning the President's role during the Civil Service proceeding. Once again, however, contemporaneous documents suggest an understandable reluctance to attribute personal knowledge and intent-to-harm to the Chief Executive himself. *See, e.g.*, letter from Mollenhoff to Nixon, Feb. 13, 1973, defendant Nixon's exhibit 52.

A personal suit against a sitting President of the United States should never be undertaken lightly, given the deference due his office and all the uncertainties as to his amenability to suit but recently settled by *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979). Plaintiff's former counsel apparently believed that Nixon's press conference admission of responsibility and the immediate confusing retraction provided insufficient grounds, and this Court so held when the first summary judgment motions following remand

were decided. Although tapes and other discovery now clearly justify including him as a defendant, the most energetic probing has not disclosed a basis for holding that plaintiff, with diligence, should have proceeded earlier. At most it appears plaintiff had reason to believe that Nixon had been informed of allegations regarding the injustice of plaintiff's termination and had declined to become involved. But even then plaintiff's sources felt the President had somehow been misled. Given all the contemporaneous confusion, the trail to the highest office in the land was murky and the White House continued to conceal.

The motions of each defendant for summary judgment on the grounds that suit is barred by the Statute of Limitations are denied.

/s/ Gerhard A. Gesell
United States District Judge

March 26, 1980

APPENDIX B

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
September Term, 1979

No. 80-1406

A. Ernest Fitzgerald
v.
Alexander P. Butterfield,
Appellant
H. Robert Haldeman, et al.
(Civil Action No. 74-0178)

No. 80-1047

A. Ernest Fitzgerald
v.
Alexander P. Butterfield, et al.
Richard Nixon,
Appellant
(Civil Action No. 78-0178)

No. 80-1408

A. Ernest Fitzgerald
v.
Alexander P. Butterfield, et al.
Bryce N. Harlow,
Appellant
(Civil Action No. 78-0178)

[Filed Apr 30 1980]

BEFORE: Tamm, Mikva and Robb, Circuit Judges

ORDER

Upon consideration of appellee's motions (1) to dismiss for lack of jurisdiction, or, in the alternative, for summary affirmance and (2) for expedited consideration of his motion, of appellants' oppositions thereto, and of the District Court's request that this matter be expedited, it is

ORDERED by the Court that the motion to dismiss is granted.

Per Curiam

Circuit Judge Robb did not participate in the foregoing order.

APPENDIX C

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 80-1406 September Term 1979

A. Ernest Fitzgerald, Civil Action No. 74-0178

v.

Alexander P. Butterfield,
Appellant

H. Robert Haldeman, *et al.* [Filed July 14, 1980]

And Consolidated Case No. 80-1408

Before: Tamm and Mikva, Circuit Judges

ORDER

On consideration of appellants' petition for rehearing it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

For the Court:

George A. Fisher,
Clerk

By: Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 80-1406 September Term, 1979

A. Ernest Fitzgerald, **Civil Action No. 74-0178**

v.

Alexander P. Butterfield,
Appellant

H. Robert Haldeman, *et al.* [Filed July 14, 1980]

And Consolidated Case No. 80-1408

Before: Wright, Chief Judge, McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

O R D E R

The suggestion for rehearing *en banc* by appellants Butterfield and Harlow has been transmitted to the full Court and a majority of the judges in regular active service have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For the Court:

George A. Fisher, Clerk

By: Robert A. Bonner
Chief Deputy Clerk

Circuit Judges Robb and Ginsburg did not participate in the foregoing order.

APPENDIX D

UNITED STATES CONSTITUTION

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * *

5 U.S.C. §7211

Employees' right to petition Congress

The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.

* * * * *

18 U.S.C. § 1505

§1505. Obstruction of proceedings before departments, agencies, and committees

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended

such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutiliates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress –

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Office-Supreme Court, U.S.
FILED
FEB 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-945

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

BRYCE N. HARLOW and ALEXANDER P. BUTTERFIELD,

Petitioners,

v.

A. ERNEST FITZGERALD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-945

BRYCE N. HARLOW and ALEXANDER P. BUTTERFIELD,

Petitioners,

v.

A. ERNEST FITZGERALD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

INTRODUCTION

This is the second petition for a writ of certiorari filed in this case. The first, filed by petitioners' co-defendant Richard Nixon,[1] is still pending. Respondent opposed the earlier petition,[2] partly on the ground that, in denying

[1] *See* Nixon v. Fitzgerald, No. 79-1738, filed May 2, 1980.

[2] Brief for Respondent in No. 79-1738, filed May 6, 1980.

the motions for summary judgment in this case, the District Court clearly applied the correct legal principles as enunciated by the United States Court of Appeals for the District of Columbia Circuit in *Halperin v. Kissinger*, 606 F.2d 1192 (1979).

Subsequently, this Court issued a writ of certiorari in *Halperin*, and that case has now been fully briefed and argued. At this point it is thus apparent, as both Mr. Nixon[3] and Messrs. Harlow and Butterfield[4] recognize, that the most appropriate course is for this Court to hold these petitions until its *Halperin* decision is announced and then grant these petitions and remand this case so that the District Court can apply the principles announced in *Halperin* to the very extensive record[5] in this case, assuming that the principles thus announced are deemed to cover the factual situation present here.

The immunity defenses asserted by petitioners here are substantially the same as those asserted by defendants in *Halperin*, and respondent adopts by reference the arguments in his earlier brief[6] and that of respondent Halperin in opposition to such defenses. However, there are a number of distinctions between this case and

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[3]*See* Petitioner's Response to Respondent's Reply to Motion for Expedited Consideration of the Petition for a Writ of Certiorari in No. 79-1738.

[4]*See* Memorandum for Respondents Alexander Butterfield and Bryce Harlow at 3-4, filed June 24, 1980 in No. 79-1738, and Petition for a Writ of Certiorari in No. 80-945 at 21.

[5]The record includes over 5,000 pages of deposition testimony, several hundred documentary exhibits, voluminous interrogatory answers and responses to requests for admissions, and extensive briefing of the eight summary judgment motions filed by various defendants during the course of the litigation.

[6]Brief for Respondent in No. 79-1738 at 13-16.

Halperin which could conceivably bear upon the Court's resolution of these questions, and respondent thus feels compelled to bring to the Court's attention certain aspects of the record below which appear to have been misapprehended or overlooked in the instant petition.[7]

I.

SUMMARY JUDGMENT WAS PROPERLY DENIED IN THIS CASE BECAUSE THE RECORD CONTAINS SUBSTANTIAL EVIDENCE OF PETITIONERS' APPROVAL OF AND PARTICIPATION IN ACTIONS TO DEPRIVE RESPONDENT OF HIS EMPLOYMENT IN RETALIATION FOR HIS EXERCISE OF FIRST AMENDMENT RIGHTS.

With virtually no citation to the record for support, petitioners repeatedly assert that respondent lost his job as a result of a bona fide reorganization of the Department of the Air Force and that there is no evidence to indicate that petitioners had a role in any effort to deprive respondent of his employment on account of his Congressional testimony. Thus, petitioners refer to "the complete lack of evidence linking petitioners with the decision to adopt the Air Force reorganization plan" (Pet. at 19) and represent that "[a]fter almost seven years of litigation, and after the close of exhaustive discovery involving countless depositions, Mr. Fitzgerald has been unable to uncover any evidence whatever establishing that petitioners had a part in the decision to

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[7]The fact that respondent's position in the present case is so well supported by the record may have been the factor which caused the Solicitor General, after due consideration (*see* Solicitor General's Application for an Extension of Time Within Which to File a Petition for a Writ of Certiorari, filed September 19, 1980, at 2) to decline submitting a petition on behalf of these petitioners.

eliminate his job or the decision not to rehire him." (Pet. at 17.)[8] It is largely this "thin" state of the record, say petitioners, which confirms the need for a summary judgment ruling that will preclude their being forced to go to trial. (Pet. at 19.)

Of course, it is not necessary for respondent to show that petitioners were the only, or even the chief, actors in the plot to injure him. Respondent's complaint alleges a civil conspiracy and charges that various conspirators took different actions at different times to further the injurious conduct. What is required is that respondent establish an "affirmative link" between the injurious conduct and "the adoption of any plan or policy by petitioners—express or otherwise—showing their authorization or approval of such misconduct." *Rizzo v. Goode*, 423 U.S. 362, 371 (1976). Here, respondent has amassed a very substantial body of evidence from which a jury could quite properly conclude that the supposed "office reorganization" was in fact a pretext for a retaliatory termination of respondent's employment and that petitioners knowingly supported, approved, and furthered that termination effort.

Typically, in conspiracy cases, "where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot," *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), plaintiffs necessarily prove their case through "documents, [and] circumstantial

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[8] *Accord*: Pet. at 6: "Despite six years of discovery, Mr. Fitzgerald failed to uncover any evidence showing that petitioners had in any way initiated or approved the Air Force reorganization or had initiated any contact with the Air Force or Defense Department regarding the Fitzgerald matter."

evidence and inference." *Blankenship v. Boyle*, 329 F. Supp. 1089, 1099 (D.D.C. 1971). *Accord: Crowe v. Lucas*, 595 F.2d 985, 993 (5th Cir. 1979). Here, respondent indeed relies on many contemporaneous documents, circumstantial evidence, and inference, but also on taped conversations, videotapes, and deposition testimony which directly implicate petitioners and others in the conspiracy.

Naturally, petitioners dispute many of respondent's factual assertions and point to other evidence of record which, they contend, supports a different version of the pertinent events. But it is just such "a genuine issue as to any material fact" which, under Federal Rule of Civil Procedure 56(c), precludes the granting of summary judgment, as the District Court here expressly recognized. (Pet. at 2a, 3a, and 4a.) Indeed, even if that rule were repealed and respondent were required to meet the higher standard proposed by petitioners,[9] it is quite clear that the evidence in this record more than meets that test.

A. The Evidence With Respect to Harlow.

1. *Origination of the plan to "RIF" Fitzgerald in retaliation for his First Amendment activity.*

Within days of his November 1968 Congressional testimony concerning cost overruns on the Air Force's C5A transport plane, respondent was told by then-Secretary of the Air Force Harold Brown that he had

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[9]Petitioners suggest that, when presented with a summary judgment motion, the judge should "determine whether the credible evidence uncovered by the discovery process adds up to a substantial showing that the defendants were implicated in the alleged constitutional tort." (Pet. at 18-19.)

made "a damn poor witness." (Fitzgerald Dep. at 323.) Brown then had a memorandum prepared describing three methods "which could result in Mr. Fitzgerald's departure," including the reduction in force ("RIF") method ultimately used to effect his removal. (PX 113[10] at 2-3.) Three days later, on January 9, 1969, Brown met with incoming Secretary of the Air Force Robert Seamans and discussed Fitzgerald for ninety minutes. He told Seamans that "Fitzgerald is of no use to the Air Force" and "is to be discouraged from remaining." (PX 71.) The contemporaneous memorandum of the conversation reports that Brown and Seamans agreed on this plan because of Fitzgerald's "unacceptable" practices of "speaking to the press," discussing Air Force matters with and providing documents to Congressional committee staffs, and generally "volunteering and advocating contrary views to the press and the Congress." (*Id.*)

Following this discussion, which occurred before Secretary Seamans had taken office, Assistant Air Force Secretary Thomas Nielsen kept coming to Seamans with a proposal to "get his office reorganized with an idea that Ernie's job wouldn't be there any more." (PX 94—Robert Seamans' oral history of the Fitzgerald matter, recorded in 1973 and 1974—at 6.)

The plan to get rid of Fitzgerald by means of a reorganization was solidified in May 1969, immediately after the C5A scandal had boiled over again in a series of embarrassing newspaper articles. (PX 94 at 7; PX 118; PX 120; PX 171; PX 172; PX 173; PX 174; April 30 and May 1, 1969 entries in PX 65, Secretary Seamans' daily logs.) In several lengthy meetings, Secretary of Defense Laird

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[10]In this brief, "PX" stands for plaintiff's deposition exhibits and "DX" for defendants' deposition exhibits.

and Dr. Seamans discussed the adverse publicity and the reorganization plan as it related to Fitzgerald's tenure. (PX 65 at April 30, 1969.) Seamans concluded that Fitzgerald had to be removed from the Air Force, partly because of his communications with Congress and partly because of the impact of his Congressional testimony on his relationship with Air Force officials. (PX 94 at 7-8; Seamans Dep. 2-68 to 2-69, 3-177 to 3-182.)

However, by early May, both Seamans and Laird had made commitments to Congress to respect Fitzgerald's rights and to take no adverse action against him, and Laird had given the express assurance that "he is not being fired." (*See, e.g.*, PX 110; PX 111; PX 117; Laird Dep. at 52.) A jury could reasonably infer from this record that Seamans and Laird therefore needed the advice and approval of the White House before dishonoring their public commitments and firing Fitzgerald from the Air Force.

2. *Harlows' advice and approval of the termination plan.*

On May 9, 1969, Secretary Seamans had the first of at least four personal communications with petitioner Harlow concerning the Fitzgerald matter, notwithstanding Secretary Laird's standing rule against such communications (Laird Dep. at 16-18; DX 132) and the well-established and strongly enforced White House procedure for "funneling" communications with the Defense Department through the National Security Council. (Haig Dep. at 6-7, 21.) Seamans related to Harlow the background of the Fitzgerald matter, Fitzgerald's relationship to the C5A, and the testimony he had given about the overruns in November 1968. (Seamans Dep. 2-112 to 2-117.) Harlow was already well aware of many

of these facts in any event, since he had been annoyed by having to share the speaker's platform with Fitzgerald some weeks previously at a Congressional dinner and there having to defend what he took to be Fitzgerald's "attacks" on the President's defense leadership. (Harlow Dep. at 153-59.)

Following the initial telephone call from Seamans, Harlow's aide, Lamar Alexander, also spoke with Seamans, after which Seamans and Harlow met in person on May 15, 1969. (Seamans Dep. at 2-141 to 2-142, 2-172, 3-255.) On this occasion, Harlow was involved in supervising a Presidential meeting with Congressmen but "had to leave the room to talk with the Secretary, because he suggested he wanted to talk to me." (Harlow Dep. at 58.) "Seamans told him [Harlow] he was going to do it [*i.e.*, terminate Fitzgerald's employment] and wanted counsel as to timing and how to proceed." (PX 26A; Wilson Dep. at 35.) In what Seamans has characterized as "advice" from the White House (Seamans Dep. at 2-148), Harlow responded that he understood that the Air Force had "a problem, but this is not the best time to separate Fitzgerald." (PX 94 at 11.)

On the following day (May 16, 1969), Seamans discussed with Laird the reorganization "as it related to Dr. Seamans' conversation with Bryce Harlow at White House." (PX 65 at May 16, 1969.) On May 17, 1969, Seamans and Laird attended a White House meeting with President Nixon, during which meeting Seamans had "a long conversation in which the Fitzgerald issue arose" and President Nixon referred disapprovingly to the "Fitzgerald kind of thing" as "conduct [that] was undesirable in the Executive Branch." (Schlesinger Dep. at 13-14, 20, 24, 31-33, 55, 57-58.)

Criticism of the Executive Branch intensified in June 1969 when Senator Proxmire held hearings on defense spending at which Fitzgerald was a witness, after being temporarily muzzled by the Pentagon. (DX 12; DX 114 at 3-4.) President Nixon was soon advised that "the Administration * * * has not come off well" during these hearings and that "the Pentagon's muzzling for 72 hours of the Air Force civilian who first exposed the C5A overrun was a classic case of poor public relations." (*Id.*) White House aide Tom Huston recommended to the President that "we ought to fight like we are used to power and know how to use it," noting that

> [o]ur opponents will scream bloody murder if we really turn the heat on them, but they will know we mean business, that we're not soft, and that they cannot expect to fire away with immunity. (DX 114 at 5.)

Mr. Nixon concurred. In June 1969, he ordered John Ehrlichman to have Huston and Patrick Buchanan "work with defense and Congress to stir up some activity" and requested that Laird and Harlow should "read and note" the criticisms. (*Id.*; DX 115.)

3. Harlow's role in overcoming opposition to the termination plan.

On November 4, 1969, the Air Force announced the planned termination of Fitzgerald effective January 5, 1970. (PX 131.) Seamans immediately called Harlow at the White House again to inform him of Fitzgerald's firing. (PX 66 at November 4, 1969 entry; Seamans Dep. at 2-203 to 2-204.) Following his conversation with Harlow, Seamans personally visited and called various members of Congress and dispatched his aides Spencer Schedler and Colonel Pewitt to perform the same mission, stating that Fitzgerald had become "a real

problem and a *persona non grata*," that he was not a team player, and that

> [a]fter his revelations concerning the C-5A the Secretary's office ran a review for themselves and *early in summer knew where they stood.* [Memorandum from the files of Cong. Gerald Ford (November 11, 1969) (Attachment D to Respondent's Summary Judgment Opposition); PX 66 at November 10, 1969 (showing telephone call from Seamans to Frank Meyer, Administrative Assistant to Cong. Gerald Ford) (emphasis added).]

The timing of these events gives rise to the reasonable inference that in their November 4, 1969 telephone conversation, Harlow and Seamans also discussed what story the Air Force would tell Congress to justify Fitzgerald's removal.

After the announcement of the proposed firing was made public, White House ombudsman Clark Mollenhoff began investigating the matter and concluded that the termination of Fitzgerald was totally unjustified. (Mollenhoff Dep. at 73-76, 79-83, 88-89; PX 25.) He thus prepared a November 17, 1969 memorandum for President Nixon urging that the President cancel the termination order and gave the memorandum to Harlow for delivery to the President. (DX 40.) Although he had already discussed Fitzgerald's termination three times with Seamans, Harlow falsely denied to Mollenhoff any prior knowledge of the matter. (Mollenhoff Dep. at 58-60.) However, Harlow subsequently informed him that he had delivered the memorandum to Mr. Nixon and discussed it with him. (Mollenhoff Dep. at 49, 112-113, 186; *accord*: President's Daily Diary at November 17, 1969.)

While Harlow professes no recollection of any such conversation with Mr. Nixon, the record provides ample evidence of their discussion. Thus, President Nixon

expressly recalled that "Bryce was all for canning him" (DX 172 at 4) and even suggested in 1973 that Ronald Ziegler refer Mollenhoff to Harlow because "the President has some recollection that Harlow has some information on it." (*Id.* at 5.) In addition, in discussing the case with John Ehrlichman, Mr. Nixon specifically recalled that "Harlow had raised it with me I think," to which Ehrlichman replied that "Harlow particularly talked to you about it." (PX 140 at 10.) Far from establishing petitioners' assertion that Harlow did *not* have any role with respect to Fitzgerald's termination, the record strongly supports Ziegler's statement to Mr. Nixon that "when we came in it was all Harlow's ball game * * *." (DX 172 at 4.)

This conclusion is strongly buttressed by President Nixon's recorded 1973 remarks, after a press conference at which a specific question about Fitzgerald was raised:

> I said get rid of that son of a bitch. You know, "cause he is, he's been doing" this two or three times. So Seamans, who isn't much of a sandbagger uh, will get rid of him I understand, uh, claimed executive privilege because he knew that I had ordered it. (PX 140 at 2.)
>
> * * * * *
>
> I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and *Mr. Seamans must have been talking to someone who had discussed the matter with me.* (PX 19 at 9.) (emphasis added.)

The record shows that the person Seamans had been talking to was petitioner Harlow, who "was all for canning him" (DX 172 at 4), and this advice to President Nixon undoubtedly played a part in the presidential decision to terminate plaintiff's employment.

B. The Evidence With Respect to Butterfield.

Petitioner Butterfield's involvement with Fitzgerald began in about May of 1969 when he gratuitously called John Ehrlichman's attention to the alleged plans of Fitzgerald "to blow the whistle" on shoddy purchasing practices. (DX 135.) "[F]ortunately for us," said Butterfield, someone had tipped the Administration off. (*Id.*)

Subsequently, in approximately December 1969, White House Chief of Staff H. R. Haldeman chaired a meeting of certain White House aides at which he, Haldeman, gave a derogatory resume of the Fitzgerald case. (Butterfield Dep. at 157-61.) Butterfield attended the meeting and later testified:

> As I recall what I heard, Mr. Fitzgerald did not go through channels, which I would consider—did not go through channels and instead went on his own to the Congress, to the Hill, to report some cost overruns. (*Id.* at 158.)

Butterfield also knew about the Fitzgerald matter from what he read in the papers from time to time and was therefore well aware that Fitzgerald had given information to Congress about cost overruns. (*Id.*)

Following the meeting, Butterfield, who was normally just "a paper flow guy" (Ziegler Dep. at 100; Haldeman Dep. I at 48), took it upon himself to assert his substantive views on the Fitzgerald matter, based upon his "strong lines of communication and contact" with the Air Force. (Haldeman Dep. I at 199-201.) Knowing that his remarks would have a bearing on "whether or not he [Fitzgerald] would be put back on the Federal payroll or whatever" (Butterfield Dep. at 146), Butterfield telephoned his remarks to Haldeman at the Western White House:

> Let's let him bleed for awhile. He is 100% disloyal—not without expertise in his field, but nonetheless 100% idsloyal [sic].
>
> * * * * *
>
> If there is still some plan to pick up Fitzgerald and bring him into the Federal Government structure, we should certainly not do it right away. I say this for two reasons:
>
> 1. It would be an admission of error on *our* part.
> 2. Senator Proxmire and others who have made a hero of Fitzgerald deserve first choice. Let's wait awhile and see if they pick him up.
>
> (DX 166.) (emphasis added.)

At the time of these gratuitous remarks, there was no pending "inquiry" from the White House press office, as suggested by petitioners. (Pet. at 4.) In fact, contrary to Butterfield's assertion (Pet. at 3) that he was "typically required to express his recommendations to the President and the President's principal assistants on many matters of White House concern," Haldeman, the intended recipient of the remarks, has denied that he was involved in or had anything substantively to do with the preparation of positions for Presidential press conferences. (Affidavit of H. R. Haldeman ¶ 3, August 25, 1977.) The person who had this responsibility was Patrick Buchanan, to whom Butterfield admittedly did not send a copy of his memorandum about Fitzgerald. (Butterfield Dep. at 197.)

Just in case his oral remarks did not have their obviously intended effect, Butterfield elaborated upon them and reduced them to writing in his January 20, 1970 "let him bleed" memorandum. (PX 12.) He sent the memorandum not only to Haldeman, but also to Ehrlich-

man, Kissinger, Herb Klein, Chuck Colson, Lyn Nofziger, Jeb Magruder, and Ron Ziegler. (*Id.*, Magruder copy; DX 156, Kissinger copy.) This time he stated that Fitzgerald "*must* be given very low marks in loyalty" and reminded the readers that, "after all, loyalty is the name of the game." (PX 12 at 1, emphasis in original.) He also added the advice that, "we should let him bleed, for a while at least."[11] (*Id.* at 2.) Doing otherwise would admit "earlier wrong-doing on our part." (*Id.*)

Butterfield is under oath as having intended by the phrase, "let him bleed":

> Let him cry, let him suffer, for at least awhile. And that is precisely what I did mean. (Butterfield Dep. at 143.)

His intent was perfectly consistent with his attitude towards a "rat" (Attachment G to Respondent's Summary Judgment Opposition) who "took it upon himself to decide * * * that I am doing something wrong and goes to Congress with it, I think that fellow ought to be fired * * *." (Attachment H to Respondent's Summary Judgment Opposition.)

Thus, Butterfield communicated not once, but at least three times, to be certain that his totally unverified accusations against Fitzgerald, together with a recommendation that the Administration let him suffer, got broad circulation within the White House. By these acts, Butterfield joined the conspiracy to retaliate against Fitzgerald for his communications to Congress, even to the point of urging that a person who engages in such communications "ought to be fired." (*Id.*)

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[11]Significantly, the petitioners' description of this memorandum (Pet. at 5) omits any mention of this malicious language.

II.

PETITIONERS' ARGUMENTS FOR A "SUPERVISORY" ADMONITION CONCERNING QUALIFIED IMMUNITY ARE NOT WELL TAKEN.

A. The District Court Here Did Not Misapply Butz v. Economou and Using This Case to Issue a "Supervisory Ruling" for Other Lower Courts Is Not Appropriate.

In Part III of their petition, petitioners quote this Court's conclusion that a principle of qualified immunity for constitutional violations is workable since "insubstantial lawsuits can be quickly terminated by federal courts * * * on a properly supported motion for summary judgment based on the defense of immunity." *Butz v. Economou*, 438 U.S. 478, 507-508 (1978). Petitioners contend that this approach has proven ineffectual since lower federal courts, including the District Court in this case, have treated a plaintiff's mere allegation of malice as sufficient to bar summary judgment. (Pet. at 15-16.) Thus, petitioners maintain that this Court should exercise its "supervisory powers over the federal judicial system" in order to "reemphasize the need for appropriate use of summary judgment disposition of qualified immunity claims" and "clarify its rule in *Butz* for the benefit of the lower courts." (Pet. at 17, 20.) Petitioners' arguments for issuing such a supervisory ruling in this case are not well taken.

First, what other courts have done with other cases is irrelevant to this case. If other district courts have misapplied the *Butz* standard, then those errors should be corrected through appeal and, if appropriate, certiorari in *those* cases. The petition here, however, gives reason to doubt that mistakes of the sort petitioners postulate have occurred with any frequency. As evidence that lower federal courts have denied summary judgment on a mere

allegation of malice, petitioners cite *Clark v. United States*, 481 F. Supp. 1086 (S.D.N.Y. 1979), *appeal dismissed in part and stayed in part*, 624 F.2d 3 (2d Cir. 1980) and *Dellums v. Powell*, 490 F. Supp. 70 (D.D.C. 1980). (Pet. at 16.) Yet, neither case involved a ruling on summary judgment. Rather, *Clark* concerned a motion to dismiss the complaint, and *Dellums* involved a motion for judgment on the pleadings.

Moreover, petitioners' apparent misapprehension of federal civil procedure is further confirmed by their mischaracterization of the District Court's actions in this case. In the Statement of the Case portion of their petition, petitioners assert that the District Court refused to rule on their claim of qualified immunity. (Pet. at 6-7.) This is not so. The matter of qualified immunity was briefed extensively to the District Court, and the Court expressly ruled that the existence of genuine issues of fact precluded the granting of summary judgment on this defense.[12] In short, the District Court did not "refuse to rule" on the qualified immunity defense. Rather, it ruled against petitioners on this defense because they had failed

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[12]The District Court's order denying summary judgment states in pertinent part:

> In order to establish qualified immunity, each defendant must show that he was acting "within the outer perimeters" of his responsibilities, that any action taken was performed without malicious intent to deprive plaintiff of constitutional or other rights, and that it was reasonable to believe that any action taken was legal. Butz v. Economou, supra; Halperin v. Kissinger, supra. *See* Wood v. Strickland, 420 U.S. 308 (1975). *Genuine issues of fact remain as to the scope of each defendant's responsibilities, the objective reasonableness of any beliefs each may have had concerning the legality of his alleged conduct in the Fitzgerald matter, and the subjective good faith underlying such conduct.* (Pet. at 2a-3a.) (emphasis added.)

to present a "properly supported motion for summary judgment."

Finally, petitioners assert that "the inference is inescapable" that, but for the Court of Appeals precedent in *Halperin v. Kissinger*, the District Court in this case would have granted petitioners' motion for summary judgment. (Pet. at 17.) Apart from its deficiency as total speculation, this assertion is highly improbable. Language in the District Court's opinion[13] strongly suggests that it found ample evidence in the record for submission of this case to the jury.

B. Petitioners Have Not, as They Suggest, Established Their Qualified Immunity Defense as a Matter of Law.

Petitioners argue that the evidence before this Court warrants a ruling that "*as a matter of law* petitioners ought not, on this type of record, be forced to put any issue here to a trial." (Pet. at 19, emphasis in original.) In

[13]Thus, Judge Gesell's order denying summary judgment refers to "White House prevarications and duplicity," and indicates that the inclusion of President Nixon as a defendant is "clearly justified" on the present record and "active concealment by Harlow can be implied on plaintiff's version of the facts." (Pet. at 9a-10a.)

order to establish their defense of qualified immunity, petitioners have the burden of proving that (a) they were acting within the scope of their employment and the ambit of their lawful discretion, (b) they believed in good faith in the lawfulness of their conduct, and (c) such belief was reasonable. *Butz v. Economou*, 438 U.S. 478, 497-98 (1978); *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974); *Halperin v. Kissinger*, 606 F.2d 1192, 1209 (D.C. Cir. 1979); *Accord*, Pet. at 11. This, petitioners have utterly failed to do. While the petition is replete with conclusory assertions that petitioners were "senior advisors" to the President (Pet. at 3, 7, 12) who were "daily called upon to 'second guess' decisions of executive departments" (Pet. at 13) and who "every day deal[t] with matters of critical importance to the nation" (Pet. at 14), the record plainly shows that, as regards their actions concerning Fitzgerald's employment, they acted unreasonably, in bad faith, and outside the scope of their regular employment.

1. The evidence with respect to Harlow.

The record is studded with testimony establishing that petitioner Harlow's multiple communications with the Defense Department and others about "canning" Fitzgerald were outside the scope of his employment. He volunteered it himself at his deposition, admitting that "Mr. Fitzgerald was not in my wicket. I was charged with other matters." (Harlow Dep. at 181.) Dr. Schlesinger testified, "I would have been surprised if Mr. Harlow had brought this up. * * * [I]t was not his area of concern. * * * I doubt very much it is the sort of subject that Harlow would raise." (Schlesinger Dep. at 28.)

Moreover, General Haig testified that the White House required that communications with the Defense Depart-

ment be funneled through the National Security Council and that "this rule" applied "even more importantly" to communications with the service secretaries. (Haig Dep. at 21-22; Butterfield Dep. at 121.) Yet Haig was never apprised of Harlow's repeated communications with the Air Force regarding the Fitzgerald case. (*Id.*)

Even Harlow's own deputy, William E. Timmons, testified that,

> I would consider it highly unusual for him [Harlow] to have direct communication on an issue like this.
>
> Q: That is direct communication with the Department of Defense or the Department of the Air Force?
>
> A: I would think that would be unusual. If it were a major legislative issue, I would think that not unusual.
>
> Q: But an issue such as Mr. Fitzgerald's employment, it would be highly unusual for him to have direct communication with the Department of the Air Force or the Department of Defense?
>
> A: I would think so. * * * (Timmons Dep. at 49-50.)

Why then did Harlow have a half dozen separate communications with Seamans and Assistant Defense Secretary Packard regarding Fitzgerald's employment, and why did he, and not the National Security Council, act as a conduit for Packard's "vehement protest" concerning possible reinstatement of Fitzgerald? (PX 141.) Mr. Nixon supplied the answer in his second deposition, testifying that Harlow would take the Defense Department's position because of his long association with Defense while on the staff of the Armed Services Committee. (Nixon Dep. II at 7, 33-34.)

Thus, Harlow's motive for passing beyond his normal role, urging the President to "can" Fitzgerald, and apparently coaching the whole "ball game" (in Mr. Ziegler's words) (DX 172 at 4), was personal. But such personal animus is completely inconsistent with the good faith and reasonable belief required for qualified immunity, just as Harlow's actual communications outside of channels negate any claim that he was acting within the scope of his employment. Nor, if Harlow were acting in good faith, is there any credible explanation for his concealing from Mollenhoff his own prior knowledge of the firing and his communications with Secretary Seamans about it. (Mollenhoff Dep. at 58-60.)

In short, Harlow was not "required, by the legal obligations of his * * * position to exercise discretion * * *" in the Fitzgerald matter. *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). Rather, he involved himself out of personal malice, at his own initiative and the initiative of his co-conspirators. The present record strongly supports this conclusion and clearly precluded summary judgment on petitioner Harlow's immunity defense.

2. *The evidence with respect to Butterfield.*

The petition gives the impression that petitioner Butterfield's position at the White House required that he routinely make substantive recommendations concerning the formulation of administration policy. (Pet. at 3, 4.) However, Ziegler described Butterfield as a mere "paper flow guy" and testified under cross-examination by Butterfield's own counsel that, contrary to the impression left by the petition (Pet. at 4), "I don't believe Butterfield would have been an individual that would have prepared substantive matters for a press conference." (Ziegler Dep. at 105-106.) General Haig also

recalled Butterfield's role as "highly administrative" and testified that for Butterfield to have sent the National Security Council a memorandum concerning "substantive matters" would have been an exception to the rule. (Haig Dep. at 36.)

As for petitioners' assertion that Butterfield would regularly advise Haldeman on a variety of substantive subjects, a jury would certainly be entitled to compare that assertion with what Butterfield told a reporter in 1973 before this litigation commenced: "I wasn't the kind of fellow that would normally advise Haldeman on anything—it wasn't my role at all." (Attachment H to Respondent's Summary Judgment Opposition.) Indeed, said Butterfield, "I wrote one other memo, similar to that, out of my field entirely. Haldeman should have said, this is none of your business." (*Id.* at 2.)

Finally, the contention that it was Butterfield's proper role to prepare memoranda like his "let him bleed" memorandum of January 1970 (PX 12) collides head-on with President Nixon's own testimony that he did *not* want Butterfield preparing memoranda of this sort:

> And I would not have wanted that attitude in the matter to get any further than it did, which apparently it did to Mr. Haldeman, who was Mr. Butterfield's immediate superior. (Nixon Dep. I at 332.)

Of course, the memorandum *did* get further than Mr. Haldeman; it was circulated to more than half a dozen persons in the White House, as well as the National Security Council. (PX 12; PX 237.)

To rule on this record that it was within the scope of Butterfield's employment to circulate vicious personal remarks and a recommendation that the Administration

should let a concededly "top-notch cost expert" "bleed" is to license every mean and petty impulse of those temporarily in power. President Nixon himself has testified that he did not want this kind of "advice," and it was surely not necessary to the effective functioning of the government.

III.

NOR IS THE DEFENSE OF ABSOLUTE IMMUNITY SUPPORTED BY THIS RECORD, EVEN IF THIS COURT WERE INCLINED TO GRANT SUCH IMMUNITY DERIVATIVELY TO ALL PERSONS "CARRYING OUT THE ORDERS OF THE PRESIDENT."

Petitioners argue that their employment as members of the White House staff placed them in one of those "exceptional situations" where "absolute immunity is essential for the conduct of the public business" under *Butz v. Economou*. (Pet. at 10.) The arguments against an absolute immunity for Presidential aides are well articulated in the briefs filed by respondent Halperin in his case and need not be repeated here. However, some further difficulties presented by the absolute immunity claim asserted in this case deserve brief comment.

In the argument before this Court in *Halperin*, the Solicitor General urged that the President should be accorded an absolute immunity from civil damage actions and that such immunity should be "derivatively" extended to those officials "carrying out the President's orders." But, of course, a vast array of public officials and others may be said to be engaged in carrying out and implementing the numerous executive orders, directives, regulations and other policies which emanate from the President on virtually a daily basis. To this respondent it appeared that the Solicitor General did not have a satisfactory answer to the vexing question of how far

down the chain of command such derivative immunity can legitimately extend. But without a clear answer, a rule of absolute immunity for those implementing Presidential orders and policies essentially immunizes the entire Executive Branch from civil liability?[14]

However, even if this Court should be disposed to accept some form of derivative defense for those carrying out Presidential directives, neither petitioner here has demonstrated on this record his entitlement to invoke such protection. First, as noted above, neither petitioner has properly established that the actions upon which liability is predicated were actually within the scope of his responsibilities as a government official; indeed, the record strongly indicates the contrary in both cases. Second, neither petitioner claims to have received a Presidential order to act in this matter; on the contrary, both deny any consultation with the President concerning this case. Moreover, unlike *Halperin*, which involved wiretaps allegedly designed to prevent the leaking of highly classified information, this case involves no element of national security. Petitioners can therefore take no solace or protection from the general subject matter of the Fitzgerald affair, even if national security or foreign policy subject matter might alone vest Presidential advisors with absolute immunity.

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[14]The proposed "derivative" immunity also raises the serious question of whether this Court wishes to decree protection for all government officials who can contend, and possibly prove, that they were "simply following orders." At Nuremberg, this nation emphatically rejected that line of defense, even in the case of military officers carrying out orders in wartime, and respondent doubts that its resurrection in the instant context would truly benefit the government or its citizens.

In short, this record, in its present state, fails to offer any reasonable demarcation line for cutting off absolute immunity or confining it to those directly implementing express Presidential instructions. Only if such immunity extends, without regard to subject matter or the existence of Presidential orders, to all those who work in the White House, or indeed the Executive Branch,[16] could it be extended to petitioners on summary judgment here.[17] But an immunity of that breadth is surely unnecessary to the conduct of any legitimate public business and thus wholly unwarranted.

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[15] If, on this record, petitioners Harlow and Butterfield are entitled to absolute immunity for their roles in the Fitzgerald matter, why should such immunity not be equally available to Secretary Seamans, Secretary Laird, military aide Col. Pewitt, Haldeman, Ehrlichman, Ziegler, and the several dozen other officials who wrote memoranda, held meetings, and took actions in the matter?

[16] Petitioners represent that respondent's "claims against Air Force officials have failed." (Pet. at 3.) However, those claims did not fail on the merits but were simply held barred by the statute of limitations. *See* Fitzgerald v. Seamans, 384 F. Supp. 688 (D.D.C. 1974), *affirmed in part and reversed in part*, 553 F.2d 220 (D.C. Cir. 1977).

CONCLUSION

For the reasons stated above, and in the brief of respondent Halperin, this Court should adopt the fair and judicious immunity rule articulated by the United States Court of Appeals for the District of Columbia Circuit in *Halperin* and should then grant the petitions here and in No. 79-738 (*Nixon v. Fitzgerald*), remanding this case for further proceedings consistent with this Court's *Halperin* opinion.

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No. 80-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BRYCE N. HARLOW and
ALEXANDER P. BUTTERFIELD,
Petitioners,

v.

A. ERNEST FITZGERALD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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March 13, 1981

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Petitioners submit this reply brief in order to correct certain misapprehensions created by respondent's brief.[1]

Since respondent makes only a *pro forma* attack on petitioners' claim of absolute immunity as Presidential advisers (Resp. at 22-24) and raises no issue on this point requiring rebuttal,[2] petitioners rest their claim for absolute immunity upon the arguments advanced in their petition and devote this reply brief to respondent's main contention, namely, that this Court need not review this case to determine whether summary judgment on the ground of qualified immunity was appropriately denied.

PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY, AND THIS COURT SHOULD REVIEW THIS CASE TO ENSURE THAT THE LOWER COURTS DO NOT EVISCERATE THE DEFENSE BY DENYING MOTIONS FOR SUMMARY JUDGMENT WHEN IT IS APPROPRIATELY ASSERTED.

Respondent contends that this is not an appropriate case for this Court to clarify when summary judgment should be

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[1] Since the filing date of respondent's brief, the district court overturned as arbitrary and capricious a ruling by a Civil Service Commission appeals officer that held that Mr. Fitzgerald's reinstated position in the Air Force was equivalent to his former position. *Fitzgerald v. Hampton*, Civ. No. 76-1486 (D.D.C. Mar. 3, 1981). *See* Pet. at 4n.4. The district court ordered the Air Force to place Mr. Fitzgerald in a new position having a rank and qualification requirement similar to his prior position, but that order does not in any way render moot the petition in the instant case.

[2] Respondent concedes that "the immunity defenses asserted by petitioners here are substantially the same as those asserted by defendants in *Halperin v. Kissinger*." Resp. at 2. *See Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *cert. granted*, 446 U.S. 951 (1980) (No. 80-880). Accordingly, if this Court decides in Halperin that senior Presidential advisers are entitled to absolute immunity, then petitioners here should be held to be absolutely immune, as the record establishes beyond question they were acting "within the outer perimeter of [their] line of duty." *Barr v. Matteo*, 360 U.S. 564 (1959). If the Court so decides, then it would not be necessary to reach petitioners' alternate defense of qualified immunity, which was also asserted by the *Halperin* defendants. Actually, the instant case affords a better vehicle than *Halperin* (which involves questions of the legality of wiretapping) for the consideration of both absolute and qualified immunity defenses: This case — a suit involving an adverse personnel decision by a federal executive department — is the very type of case against which the immunity defenses were established to protect government officials.

granted upon the defense of qualified immunity, because in his view he has adduced enough evidence to withstand a summary judgment motion under not only the traditional test but also the more stringent test applicable when qualified immunity is asserted as a defense.[3]

But in actuality, petitioners have satisfied both the traditional test as well as the more stringent test for determining whether they are entitled to summary judgment on the ground of qualified immunity. This Court can find that neither test was met only if it blindly accepts respondent's interpretation of the facts, and respondent's interpretation is utterly fanciful. For the simple fact of the matter is that after seven years of costly litigation, including exhaustive discovery, respondent has not been able to uncover one shred of direct evidence that petitioners played any part in the elimination of his job. The "very substantial body of evidence" upon which respondent relies (Resp. at 4) is in reality wholly indirect and circumstantial, based entirely on inference and innuendo.

Respondent's brief is a remarkable pastiche of the thousands of pages of depositions in this protracted case, replete with references to a bewildering array of White House and Pentagon officials. However, respondent's extensive speculation on what these officials might have been discussing or doing with respect to respondent Fitzgerald beclouds the issue — which is not whether the White House or the Air Force conspired to abolish Mr. Fitzgerald's position, but whether the individual defendants Bryce Harlow and Alexander Butterfield can be liable to respondent for their wholly peripheral "involvement" in the matter.

While petitioners recognize that in the current posture of this case, it is not appropriate for them to engage in a point-by-point rebuttal of the outright speculation and tendentious presentation of the facts in respondent's brief, some review of

[3] The more stringent test is set forth in *Butz v. Economou*, 438 U.S. 478, 507-08 (1978), and in *Halperin v. Kissinger*, 606 F.2d 1192, 1214-15 (D.C. Cir. 1979), *cert. granted*, 446 U.S. 951 (1980) (Gesell, J., concurring), and is discussed in petitioners' petition to this court for a writ of certiorari filed on December 11, 1980.

the facts is necessary because the essence of petitioners' argument is that petitioners ought not as a matter of law be forced to undergo trial where the facts on the record are insufficient to overcome their qualified immunity defense. Respondent ignores this legal issue and instead advances a specious factual argument, but as petitioners point out below, the record is clear that there is no evidence showing that they played any role in the abolition of respondent's Air Force position. Actually, respondent himself recognizes this, for he does not advert in his brief to the existence of any such evidence. Instead, respondent is reduced to admitting, in order to establish each key factual element of his allegations linking petitioners to the alleged wrongdoing, that "a jury could reasonably infer" the truth of his allegations. *E.g.*, Resp. at 7.

Respondent excuses his weak case by asserting that in conspiracy suits, "plaintiffs necessarily prove their case through 'documents [and] circumstantial evidence and inference.'" Resp. at 4-5 (citing *Blankenship v. Boyle*, 329 F. Supp. 1089, 1099 (D.D.C. 1971)). Admittedly, the federal courts have recognized that "[c]onspiracy . . . may be proved by circumstantial evidence, . . . but [it] may not be proved by innuendo and unsupported inferences." *General Tire & Rubber Co. v. Firestone Tire & Rubber Co.*, 349 F. Supp. 333, 338 (N.D. Ohio 1972). There, in words equally applicable to this case, the district court noted:

> [Plaintiff] wants this Court to take the fact of meetings and communications and some rather random words, and import all manner of malicious intentions. Weighing this evidence, the Court can take only reasonable inferences; it cannot be asked to work itself into fancy plottings. . . . The Court cannot infer malice and dishonor from a set of facts when those some facts are just as susceptible to an interpretation of innocent and proper behavior. [*Id.* at 338-39.]

1. Absence of Any Evidence against Harlow.

The basis for respondent's startling leap of inference that Mr. Harlow was responsible for "advice and approval of the termination plan" (Resp. at 7) consists solely of the fact that Air Force Secretary Seamans had three phone conversations

and one chance meeting with Mr. Harlow about the Fitzgerald matter. The first conversation occurred a few months into the Nixon administration, when Dr. Seamans, who had inherited the Fitzgerald personnel problem from the prior administration, sought an assessment from Mr. Harlow, as the President's aide for Congressional liaison, of possible Congressional reaction to a proposed elimination of Mr. Fitzgerald's position.[4] Dr. Seamans testified that "we [the Air Force Department] didn't ask [Harlow] to pass judgment on the action itself. We just asked him what the impact would be in the relationship with the Congress." Seamans Dep. 2-134. Mr. Harlow's aide called Mr. Seamans back to say that "this was a very sensitive item on the Hill and that it would be their recommendation that we not proceed to make such a change at that time." Seamans Dep. at 2-117. Dr. Seamans' testimony made clear that the decision to adopt the reorganization plan entailing the elimination of respondent's job was made exclusively by the Air Force, without White House involvement. Seamans Dep. at 2-124. Dr. Seamans' testimony on all of these points is uncontradicted.

A few days after Dr. Seamans' telephone call, he met Mr. Harlow "by happenstance" (Seamans Dep. at 2-142; *see* Harlow Dep. at 57-60) at a White House breakfast for Congressmen and gave him an "update" on the Fitzgerald matter; Dr. Seamans testified that Mr. Harlow didn't give "any advice or counsel." Seamans Dep. at 2-142.

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[4] Respondent makes much of the fact that Dr. Seamans' call to Mr. Harlow was out of the ordinary, as it was contrary to "Secretary [of Defense] Laird's standing rule against such communications" with the White House. Resp. at 7. However, it was certainly appropriate for Dr. Seamans to contact Mr. Harlow, the President's top aide for Congressional matters, regarding the proposed Air Force reorganization and its effect upon Mr. Fitzgerald, who had attracted the attention of several Congressmen. Moreover, rather than violating Secretary Laird's rule, the call to Mr. Harlow was made at the express request of the Secretary, as Dr. Seamans has testified that "contact with the White House... [was] normally handled out of Mr. Laird's office, but he felt that I was in a better position to discuss all the aspects of the reorganization with Mr. Harlow; and so he asked me to make the call." Seamans Dep. at 2-115. Besides, even if the contacts were out of the ordinary, why that fact should tend to inculpate Mr. Harlow, who (as respondent concedes) never initiated any communication with Dr. Seamans, is at best puzzling.

Again, Dr. Seamans' testimony on this point is uncontradicted, although respondent's brief might give the casual reader the impression that Dr. Seamans' testimony had been challenged by some credible evidence. Respondent's brief, in its discussion of the White House breakfast, quotes the following statement from an exhibit, without any explanation: "Seamans told him [Harlow] he was going to do it [*i.e.*, terminate Fitzgerald's employment] and wanted counsel as to timing and how to proceed." Resp. at 8. The reason respondent neglects to mention the basis of the statement is that it has been thoroughly discredited by its author, David Wilson, who joined the White House counsel's staff in 1971 (Wilson Dep. at 9), after respondent's position had been abolished. *See* App. A. The statement appears on a piece of notepaper (PX 26A) containing Mr. Wilson's handwritten notes to himself made around the time he was looking into the propriety of Dr. Seamans' assertion of executive privilege at the Civil Service Commission hearings in 1973 (three years after the Seamans-Harlow contacts). Wilson Dep. at 26. Indeed, it is ludicrous that respondent relies on the quoted statement, since its probative value is zero. In view of the totally unreliable nature of Mr. Wilson's notes to himself and the complete uncertainty as to their meaning, why then would respondent present this as "evidence" of a critical element of his allegation, namely, whether Mr. Harlow advised the Air Force on its decision to abolish respondent's position? The answer is simply that it is the only statement that respondent could find to support his case. Even so, there is still no evidence to contradict Dr. Seamans' and Mr. Harlow's testimony that no advice was given.

Finally, respondent also points to the fact that Dr. Seamans made two other calls to Mr. Harlow, but again the record is bereft of any intimation that Mr. Harlow in any way ordered, approved or even advised on the abolition of Mr. Fitzgerald's job. One call was made on November 4, 1969 (a half a year after the last contact with Mr. Harlow on the matter), the day *after* Dr. Seamans signed the reorganization plan affecting Mr. Fitzgerald, to inform Mr. Harlow of the action; and the other call was made a month later to inform Mr. Harlow that the Air Force was concerned about any White House reversal of the Department's decision. How respondent can rely on the fact of

phone calls made by Dr. Seamans after his decision to eliminate respondent's job as incriminating Mr. Harlow is mystifying.

From these three phone calls and one "happenstance" meeting — all without any suggestion on the record that Mr. Harlow played a part in the Air Force's decision to terminate Mr. Fitzgerald's position — respondent has concocted his case against Mr. Harlow. Indeed, all the evidence points the other way: As respondent admits (Resp. at 8), Mr. Harlow expressly told Dr. Seamans that the abolition of Fitzgerald's position would cause problems with Congressional relations and ought not be done (Seamans Dep. at 2-117); and this is certainly consistent with Mr. Harlow's natural desire not to make his job — Congressional relations — even more difficult. This fact was further supported by Press Secretary Ronald Ziegler, whom respondent is quite willing to quote as telling President Nixon that "when we came in it [the Fitzgerald matter] was all Harlow's ball game." Resp. at 11. But respondent neglects to quote Mr. Zielger's very next comment, which establishes that Mr. Harlow was *opposed* to the elimination of Mr. Fitzgerald's job: When the President inquired, "Bryce was all for canning him, wasn't he?," Mr. Ziegler replied, "No, I think Bryce may have been the other way." App. B.

The respondent relies heavily on statements made at and immediately after a Presidential press conference held on January 31, 1973 — more than three years after the abolition of respondent's position. In response to a question at the press conference, President Nixon stated that he had "approved" the assertion of executive privilege by Air Force Secretary Seamans at a Civil Service Commission hearing on Fitzgerald's reinstatement. But in a review session with aides in the Oval Office right after the press conference, Mr. Nixon realized that his comment had been in error, as he had been "thinking of another case." The President told John Ehrlichman, "I'm thinking of another guy actually... I had two names in my mind.... I really didn't know the question. But I had to back up the son of a bitch Seamans." Transcript of Presidential conversation with John Ehrlichman on January 31, 1973 at 4:32 p.m.[5]

[5] The transcripts of Presidential conversations relevant to this case appear as Appendix C to the petition for a writ of *certiorari* filed in this case by Mr. Nixon on May 14, 1980 (No. 79-1738).

In a sentence typical of respondent's propensity for unsupported statements and quotations taken out of context, respondent's brief states "[t]he record shows that the person Seamans had been talking to [*i.e.*, the person who had discussed the Fitzgerald matter with the President] was Harlow, who 'was all for canning him.'" Resp. at 11. However, there is no evidence to support such a conclusion. Indeed, the sworn testimony is to the contrary. Moreover, the quotation is misleading. The transcript of the White House tapes, both of the review session following the press conference and a subsequent discussion with Press Secretary Ziegler, indicate that President had only a dim memory, if any, of the Fitzgerald matter, which had occurred three years before. As is apparent from the transcript quoted in Appendix B hereto, the President's obvious confusion and poor recollection demonstrated immediately after the press conference, renders meaningless his statement at the press conference (which, in any case, does not implicate Mr. Harlow). Any inference respondent seeks to make from such statement is simply conjecture.

2. Absence of Any Evidence against Butterfield.

In the case of Mr. Butterfield, the evidence is equally sparse. Respondent bases his whole case against Mr. Butterfield on a single telephone conversation and a single memorandum in which Mr. Butterfield urged that the administration let respondent "bleed."[6] But after more than seven

[6] Respondent attempts to show that Mr. Butterfield's expression of personal opinion was outside the outer perimeter of his authority as a Presidential aide, and respondent cites the testimony of H.R. Haldeman (Mr. Butterfield's immediate superior) and Press Secretary Ziegler to the effect that Mr. Butterfield generally would not "have prepared substantive matters for a press conference." Resp. at 13, 20. But petitioner Butterfield has never asserted that his expression of opinion to Mr. Haldeman regarding the Fitzgerald matter was intended as the substantive position to be expressed at a Presidential press conference. The tone of Mr. Butterfield's memorandum makes it evident that it was not intended as the basis for a Presidential answer, and moreover the memorandum was not sent to the White House official responsible for preparing such answers. As noted in the petition (Pet. at 4), the memorandum was written to Mr. Butterfield's immediate superior (stemming from a White House Press Office inquiry) merely to ascertain whether the administration had a position on the Fitzgerald matter. The memorandum contained his personal opinion on the Fitzgerald matter, and

(*footnote continues*)

years, respondent has not been able to show that Mr. Butterfield's admittedly pungent language had any causal impact whatsoever on the Air Force's decision to eliminate respondent's job. Indeed, he cannot make such a showing, since it is undisputed that Mr. Butterfield made the telephone call and wrote the memorandum *after* the Air Force publicly announced the adoption of the reorganization plan eliminating respondent's job. The phone call was made by Mr. Butterfield to Mr. Haldeman's San Clemente office in response to a request that Mr. Butterfield look into Mr. Fitzgerald's job status, since Mr. Haldeman had been asked by the President to see if another position could be found for Mr. Fitzgerald in the federal government. DX 163; DX 165; DX 169; DX 170. The substance of the phone call was not communicated to the Air Force or Defense Departments, and no action was taken on the basis of it. Similarly, Mr. Butterfield's memorandum was not distributed to or seen by Dr. Seamans or other Pentagon officials. Seamans Dep. 3-240. As respondent concedes, in quoting *Rizzo v. Goode*, 423 U.S. 362, 371 (1976), in order for his claim against Mr. Butterfield to succeed, he must establish an "affirmative link" between Mr. Butterfield's phone call or memorandum and the allegedly wrongful termination of respondent's employment. There is no such "affirmative link," and respondent has not even hinted at one.

3. The Appropriateness of Summary Judgment.

In sum, it is hard to conceive of a case having any weaker factual foundation. Respondent bases his claims on layer upon layer of inference and innuendo, on pure conjecture and speculation about what might have happened. Since there is no evidence establishing that either Mr. Harlow or Mr. Butterfield played any role in the decision to abolish Mr. Fitzgerald's position, respondent's case is premised on the erroneous assumption that it is conceivable that a rational jury in this case could *infer*, from the juxtaposition of the dates of various phone calls, meetings and memoranda, that Mr. Harlow and Mr.

(*footnote continued*)

this was entirely proper since President Nixon had expressly given staff members such as Mr. Butterfield the authority "to express views on subjects which were not in their specific limited responsibilities." Nixon Dep. at 366-67.

Butterfield did play such a role. From Dr. Seamans' phone call on May 9, 1969 to check out Congressional attitudes, respondent would ask a jury to infer, without any evidence, that Mr. Harlow approved of and gave advice on the decision made six months later to abolish respondent's position. And from Mr. Butterfield's phone call and memorandum written after that decision, respondent would ask a jury to infer, again without evidence, that Mr. Butterfield was responsible for respondent's loss of employment. Surely a jury finding of culpability here, in the face of sworn testimony uncontradicted by any credible evidence on each material point, would be impermissible.

It is precisely this kind of patently "insubstantial lawsuit" that this Court said should be "quickly terminated" on a summary judgment motion when the defense of qualified immunity is raised. *Butz v. Economou*, 438 U.S. 478, 507 (1978). If summary judgment is denied and petitioners are forced to go to trial on as meager a record as this one, the protection that the qualified immunity defense is supposed to offer will be all but eviscerated.

Messrs. Harlow and Butterfield were called upon daily to give their opinion and advice on questions that might affect the interests of all kinds of individuals and groups. Mr. Fitzgerald's job problem was merely one of many such matters. If respondent can force this lawsuit to trial, then so too can almost any of the hundreds of other individuals or groups aggrieved by government decisions in which Presidential assistants like Messrs. Harlow and Butterfield might have had some tangential role. They could all construct the same elaborate theories upon the same layers of inference and innuendo, upon the same conjecture and speculation, asking a court "to work itself into fancy plottings." *General Tire & Rubber Co. v. Firestone Tire & Rubber Co., supra*, 349 F. Supp. at 338.

No senior Presidential adviser would be immune from suit, because an enterprising plaintiff would always be able to find some meeting or telephone call or memorandum like those found by Mr. Fitzgerald in which the plaintiff's matter was discussed. And taking that as a foundation, some theory of causality and liability could be fabricated. Factual inferences constructed from the slightest bits and pieces of evidence plus allegations of malice and civil conspiracy should not be a

simple formula for defeating a motion for summary judgment on the ground of qualified immunity. For if it is, senior advisers in every administration will never be able to escape the inevitable risks and burdens of trial, and they will always live and govern in fear of financial ruin. The debilitating impact such a result would have on the administration of government is obvious.

Thus, the very facts of this case give this Court an eminently appropriate opportunity to clarify and reemphasize what it meant when it admonished the lower federal courts to "weed out insubstantial claims" when the defense of qualified immunity is raised. *Butz v. Economou, supra,* 438 U.S. at 527. If this case can escape summary judgment, so too can almost every other lawsuit against a federal official claiming qualified immunity. In order not to undermine the protection that the qualified immunity doctrine was fashioned to afford, this Court should grant certiorari and review this case to ensure that the lower courts properly employ summary procedures when the qualified immunity defense is raised.

CONCLUSION

Petitioners respectfully assert that the Court should allow the writ of *certiorari* here.

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March 13, 1981

APPENDIX

APPENDIX A

Testimony of David Wilson regarding statement quoted in respondent's brief (see Resp. at 8):

> Q. Directing your attention once again to Plaintiff's Exhibit 26A near the bottom of the page under the world — word "Harlow," I refer you to the notation "May 15 — Seamans told him that he was going to do it." I ask you does that refresh your recollection concerning the conversation you had with Mr. Harlow?
>
> A. [Mr. Wilson:] My recollection as to specific dates is, is a not good. Generally, my guess is I had thought that Seamans had informed Harlow as to the dismissal of Fitzgerald. Obviously, that occurred in November, however, and not in May, so that—that could not relate to that, but I—
>
> Q. Then what could it relate to?
>
> . . .
>
> A. I don't know.
>
> Q. Referring your attention once again to Plaintiff's Exhibit 26A, the bottom of the page "May 15—Seamans told him . . . " Who is "him"?
>
> A. I think that must refer to Harlow. I think that notation must have been made after my conversation with Mr. Harlow.
>
> Q. I take it then that it is your best recollection that the reference in Plaintiff's Exhibit 26A for identification to the reference "Seamans told him that he was going to do it." that "it" does not refer to Fitzgerald's dismissal? Is that your recollection?
>
> A. It must refer to some proceeding in the Fitzgerald case. I do not know whether it was dismissal or whether it was in connection with uh, a congressional hearing on the matter or what.

Wilson Dep. at 34-35.

APPENDIX B

Text of the relevant portion of the transcript of the Nixon-Ziegler conversation, in which it appears that the President was thinking that he had at the press conference confused Mr. Fitzgerald with Gordon Rule (another Pentagon civil servant):

Ziegler: You see, this [*i.e.*, the Fitzgerald matter] is a case of, that, that, uh—

President: Came before we—.

Z: —came before we came in—

P: Oh, yeah.

Z: —but when we came in it was all Harlow's ball game [unintelligible]. I had a call in to Bryce on it.

P: Bryce was all for canning him, wasn't he?

Z: *No, I think Bryce may have been the other way.* That's why I [unintelligible]—.

P: Oh.

Z: See, at one point in '69—

P: Oh.

Z: —there was some discussion about hiring Fitzgerald over here at OMB—

P: Oh.

Z: —because it was felt that he did get a bum rap over there.

P: Oh, see?

Z: But I—.

P: You see, the case I was thinking about, when you asked me, was the other case—

Z: Rule.

P: —the Rule case, that's right. I thought [unintelligible]—.

Z: Which we can't say, of course.

P: I can't go [unintelligible].

Transcript of Presidential conversation with Ronald Ziegler on Feb. 26, 1973, at 4:50 p m. (emphasis added).

Nos. 79-1738 and 80-945

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD NIXON,
Petitioner,

v.

A. ERNEST FITZGERALD,
Respondent.

BRYCE N. HARLOW AND
ALEXANDER P. BUTTERFIELD,
Petitioners,

v.

A. ERNEST FITZGERALD,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS HARLOW AND BUTTERFIELD

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OPINIONS BELOW

The district court's order of March 26, 1980 denying the petitioners' motion for summary judgment is reprinted in Appendix A to the Petition in No. 80-945 (at pp. 1a-10a), but is not officially reported. The order of the court of appeals granting respondent's motion to dismiss the appeal of the district court's order is reprinted in Appendix B to the Petition (at pp. 11a-12a). It also is not officially reported.

JURISDICTION

The district court's order denying the motion of petitioners Bryce Harlow and Alexander Butterfield for summary judgment was entered on March 26, 1980 and was appealed in a timely manner to the United States Court of Appeals for the District of Columbia Circuit. On April 14, 1980, respondent filed a motion seeking either dismissal of the appeal or summary affirmance of the district court order. The motion to dismiss was granted on April 30, 1980 and a motion for rehearing was denied on July 14, 1980 (Pet. App. 13a-14a). On October 4, 1980, the Chief Justice extended the time within which petitioners Harlow and Butterfield could file a petition for writ of certiorari through December 11, 1980. The petition (No. 80-945) was filed on December 11, 1980 and granted on June 22, 1981. Their co-defendant, Richard Nixon,[1] filed a separate petition for certiorari (No. 79-1738), which was also granted on June 22, 1981. The two cases were consolidated by this Court. The jurisdiction of the Court rests upon 28 U.S.C. § 1254(1).

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[1] In the proceedings below and in this Court, President Nixon has been separately represented. References in this brief to "petitioners" and the "Petition" ("Pet.") are references to petitioners Harlow and Butterfield alone and their Petition in No. 80-945. Transcripts of depositions are cited in this brief with the corresponding record references as "[Deponent] Dep. (R.)"; and plaintiff's and defendants' exhibits to depositions are cited as "PX" and "DX."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issue of appealability involves 28 U.S.C. § 1291, which provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Respondent asserts implied causes of action under the First Amendment, 5 U.S.C. § 7211 (employee's right to petition Congress) and 18 U.S.C. § 1505 (felony to injure Congressional witness), the texts of which are reprinted in Appendix D (at pp. 15a-16a) to the Petition.[2]

STATEMENT OF THE CASE

Respondent seeks money damages from a former President and two of his senior advisers, claiming that they participated in a conspiracy twelve years ago to oust him from his Air Force civil service position in retaliation for his Congressional testimony, thus violating his constitutional and statutory rights. The case began seven and a half years ago but has not yet come to trial. The district court denied petitioners' motions for summary judgment that were based in part on the defense of official immunity. It is the denial of these motions — and not the merits of respondent's claim — that is under review.

The following discussion of the circumstances that resulted in the elimination of respondent's civil service job is detailed, but petitioners wish to show that their role in the abolition of respondent's job was wholly peripheral, and accordingly that they ought not as a matter of law be forced to go to trial where

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[2] Respondent's claim for relief under the common law of the District of Columbia, *see* Pet. App. at 2a, has been abandoned. *See* Respondent's Supplemental Brief at 2 (May 14, 1980), *Nixon v. Fitzgerald*, No. 79-1738.

the facts on the record are insufficient to overcome their qualified immunity defense.

Petitioners' Duties in the White House.

From the beginning of the Nixon administration, Bryce Harlow served as the President's top aide for Congressional matters. Harlow Dep. (R. 392) 19, 26. He had served in a similar capacity under President Eisenhower and before that as chief counsel of the House Committee on Armed Services. Harlow Dep. (R. 392) 11, 15. Because of his vast experience, Harlow had been delegated, in the President's words, "broad authority" to deal with any and all aspects of Congressional relations or legislative strategy. Nixon Dep. I (R. 378), 314. The job required daily contact with Cabinet department heads as well as with the Speaker and majority and minority leaders of the House, the majority and minority leaders of the Senate, and the chairmen and ranking members of key committees. On a typical day Harlow was in and out of the President's office several times, conducted or attended numerous White House meetings, discussed legislative strategy with Cabinet members and their aides in his office, made a couple of trips to the Hill, directed the activities of his Congressional relations staff, and somehow disposed of hundreds of telephone calls. Harlow Dep. (R. 392) 25, 29, 32, 33, 35, 189-90.

On November 4, 1969, Harlow was elevated to Cabinet-level status as Counsellor to the President. Harlow Dep. (R. 392) 11-12. He served as Counsellor until December 9, 1970, when he returned to private life. On July 1, 1973, he resumed his duties as Counsellor for a nine-month period until April 14, 1974. *Id.*

Alexander Butterfield served from the beginning of the Nixon administration as Deputy Assistant to the President and Deputy to the White House Chief of Staff (H.R. Haldeman), and was responsible for coordinating White House staff activities. Butterfield Dep. (R. 42) 4, 42, 49-52, 58, 64-66; Haldeman Dep. (R. 418) 46-48. With an office immediately adjacent to the Oval Office, he had daily contact with the President and frequently expressed his recommendations on matters of White

House concern. Butterfield Dep. (R. 41, 42) 63-64, 444, 454. *See* Haldeman Dep. (R. 418) 47-48, 250; Nixon Dep. I (R. 378) 315-16, 367. On November 4, 1969, Butterfield assumed the additional post of Secretary to the Cabinet. Butterfield Dep. (R. 41) 52. He served in both positions until March 14, 1973, when he became Administrator of the Federal Aviation Administration. *Id.* at 3-4.

The Air Force Reorganization.

In the closing months of the Johnson Administration, respondent A. Ernest Fitzgerald, then a civilian cost analyst in the Department of the Air Force, testified before a Congressional subcommittee about potential cost overruns on the Air Force's C-5A transport plane. Fitzgerald Dep. (R. 321) 257-59. *See Hearings Before the Subcommittee on Economy in Government of the Joint Economic Committee,* 90th Cong., 2d Sess., 200 (1968). Fitzgerald complained that as a result of the testimony he was virtually ostracized by his Air Force colleagues. Fitzgerald Dep. (R. 321) 225-37; Fitzgerald Affidavit (R. 28) ¶40. When he received a correction notice about his civil service status shortly after his testimony, he evidently notified *The Washington Post,* which produced a front-page article on the "retaliatory" civil service correction. J.A. 70a-71a, 73a-74a, 81a-82a (*Decision on the Appeal of A. Ernest Fitzgerald,* U.S. Civil Service Commission, Appeals Examining Office, at 8, 10-11, 16-17 (Sept. 18, 1973) (hereinafter cited as CSC Decision)). Air Force officials surmised — apparently correctly, as the Civil Service Commission later found — that Fitzgerald had planted the story "for the purpose of placing the Air Force in a bad light." J.A. 82a (*Id.* at 16-17). In the last few days of the Johnson administration, Fitzgerald was told by his immediate superior, Assistant Secretary Thomas Nielsen, that he had lost his "usefulness" to the Air Force. Fitzgerald Dep. (R. 321) 234; J.A. 73a-74a (CSC Decision 10, 11).

However, not having been tarnished by Fitzgerald's C5-A disclosures, the Nixon administration had no reason for hostility toward him. Nixon Dep. I (R. 378) 24-25; J.A. 81a (CSC Decision 16). In fact, incoming Secretary of Defense Melvin Laird and Secretary of the Air Force Dr. Robert Seamans

assured Congressional committees that Fitzgerald would not be the object of any retaliation. PX 110; *see* PX 117.

Secretary Laird, in order to gain better cost control over Air Force weapons systems, brought in his own, "more effective team" and replaced Assistant Secretary Nielsen, who had previously proposed a reorganization of the Air Force's Office of Financial Management. Seamans Dep. (R. 334, 335) 2-76 to -79; 3-189, -190, -210 (J.A. 150a, 159a-60a); Laird Dep. (R. 455) 77-78, 97-98. Nielsen's proposal, which would have eliminated Fitzgerald's position in that office of Deputy for Management Systems, was rejected by Seamans because he wanted his own newly-appointed Secretary, Spencer Schedler, to take an independent look at the question. Seamans Dep. (R. 334, 335) 2-79; 3-234 (J.A. 150a, 171a). Laird and Seamans met in the spring of 1969 to discuss reorganizing the office in order to improve its efficiency at controlling weapons cost. Seamans Dep. (R. 334) 2-44, -45; Laird Dep. (R. 455) 64, 66-68.

Harlow's Role.

Aware that Fitzgerald had attracted the attention of several Congressmen, Laird asked Seamans to request the White House staff to assess the potential political backlash on Capitol Hill if Fitzgerald's position were eliminated. Seamans Dep. (R. 334, 335) 2-113 to -115; 3-191 (J.A. 150a-51a, 160a-61a). Seamans called Harlow for this purpose on May 9, 1969. Seamans' uncontradicted testimony is that "we [the Air Force Department] didn't ask [Harlow] to pass judgment on the action itself. We just asked him what the impact would be in the relationship with the Congress." *Id.* at 2-134; 3-199, -200 (J.A. 153a, 164a-65a). Harlow's aide called Seamans back later that day to say that "this was a very sensitive item on the Hill and that it would be their recommendation that we [the Air Force] not proceed to make such a change at that time." *Id.* at 2-117 (J.A. 152a). Seamans' testimony, again uncontradicted, is that neither Harlow nor his aide expressed an opinion on the proposal to eliminate Fitzgerald's position, and they did not suggest an alternative time for its adoption. *Id.* at 2-125, -126, -132, -135, 3-202 (J.A. 166a).

A few days after Seamans' telephone call, he met Harlow "by happenstance" (*id.* at 2-142; *see* Harlow Dep. (R. 392) 57-60) at a White House breakfast for Congressmen and gave him an "update" on the Fitzgerald matter. Seamans Dep. (R. 334) 2-142 (J.A. 154a). Again, as Seamans himself admitted, Harlow did not give "any advice or counsel." *Id.*

During the summer, Laird and his staff met with Fitzgerald in an attempt to find out whether Fitzgerald's abilities could be utilized on the staff of the special DOD Blue Ribbon Panel or in some other position. Laird Dep. (R. 455) 9-11; J.A. 78a-79a (CSC Decision 14). Fitzgerald sent a memorandum to the chairman of the Panel saying that "[a]side from publicity, my situation is unique only in that I have not gone away quietly as have most others of my experience and bent." J.A. 79a (CSC Decision 14). The Civil Service Commission later ruled that "Secretary Seamans properly considered [this] statement to be a fairly inflammatory kind of statement .... [He] considered that Mr. Fitzgerald had a chip on his shoulder. It is clear that Mr. Fitzgerald was not interested in a position on the [Blue Ribbon] Panel." *Id.* Indeed, it soon became apparent to Laird that Fitzgerald simply "did not want to serve in a staff position ... in the Department of Defense." Laird Dep. (R. 455) 10, 79-80; *see* DX 133 at July 2, 1969.

On November 3, 1969, a year after Fitzgerald's Congressional testimony and six months after the telephone call to Harlow, Seamans approved an Air Force reorganization plan presented to him by Assistant Secretary Schedler. Seamans Dep. (R. 335) 3-188 to -190 (J.A. 158a-60a). Schedler's plan was part of a Department-wide "reduction-in-force" that resulted from Laird's order that the Air Force "reduce expenditures one billion dollars" and make "large cut-backs in military and civilian personnel ...." J.A. 66a (CSC Decision 4). *See* Seamans Dep. (R. 335) 3-190, -203, -209, -210, -219, -253, -254 (J.A. 190a, 166a-67a, 169a). As part of these cut-backs, the Office of Financial Management "was assigned a net reduction of two [positions]." J.A. 66a (CSC Decision 4, 5). The plan called for the reorganization of that office and entailed, among other things, the elimination of Fitzgerald's position, effective on January 5, 1970. The White House had no

part in Seamans' decision to approve the reorganization plan. Seamans Dep. (R. 335) 3-69, -188 to -190, -200, -202, -203 (J.A. 158a-60a, 165a-66a). Seamans called Harlow the day *after* approving the plan simply to inform him about it. Seamans Dep. (R. 334) 2-203, -204.

Concerned by press speculation that the President might overrule the Air Force, Seamans, again at Laird's request, called Harlow on December 5, 1969 to explain why the decision should stand: it was "part of a total, important plan of the Air Force; and, having made the decision on what [Seamans] felt were good and satisfactory reasons, [he] didn't want to see it changed." Seamans Dep. (R. 335) 3-219 (J.A. 169a). *See id.* at 3-57, 3-110 to -112; Laird Dep. (R. 455) 14, 17-18, 72-73, 98. Although he understood that Seamans was concerned, Harlow remained noncommittal. Seamans Dep. (R. 355) 3-111. In reaction to Harlow's evident neutrality, if not opposition, to the Air Force reorganization — it would, after all, somewhat complicate Harlow's dealings with Congress — Deputy Secretary of Defense David Packard called Harlow later that day to register his "vehement protest" against any White House interference. PX 141 (J.A. 227a). Harlow relayed this message to Haldeman without any comment. *Id.*

Butterfield's Role.

Butterfield's contacts with the Fitzgerald matter did not occur until *after* the decision to abolish Fitzgerald's job had been made. They consisted merely of one telephone call and one memorandum to Haldeman, his immediate superior. These came about because President Nixon, prompted by a question at his December 8th press conference, requested Haldeman to look into the possibility of finding another job for Fitzgerald. Nixon Dep. II, 10; DX 163; DX 181 (J.A. 276a, 287a). Haldeman asked Butterfield about the matter. Reporting back by telephone to Haldeman in San Clemente, Butterfield recommended that the White House not make an attempt to locate another position for Fitzgerald. DX 163; DX 165; DX 169; DX 170 (J.A. 276a, 277a, 278a, 279a). Neither the fact nor substance of this telephone call was communicated to either the Defense Department or the Air Force. *See* Laird

Dep. (R. 455) 15, 22 (J.A. 123a-24a); Seamans Dep. (R. 335) 3-240, -241 (J.A. 172a); Nixon Dep. I (R. 378) 331-32.

In early January, anticipating a question at the next press conference, the White House Press Office asked Butterfield whether the Administration had formulated a position on the Fitzgerald matter. Butterfield Dep. (R. 41, 42) 131, 294-95. In a memorandum dated January 20, 1970, Butterfield informed Haldeman of the Press Office inquiry and, in keeping with White House staff practice (Nixon Dep. I (R. 378), 366-67; Buchanan Dep. (R. 414) 120-21) and Butterfield's own relationship with Haldeman, recommended a course of action. Butterfield Dep. (R. 42) 127-30, 134, 137 (J.A. 99a, 100a). The memorandum said that, since Fitzgerald should "be given very low marks in loyalty," the White House should not interfere with the Air Force's decision, but "let [Fitzgerald] bleed, for a while at least." PX 12 (J.A. 180a). Although given routine White House distribution "so that Haldeman could get the benefit of everyone's views on the subject" (Butterfield Dep. (R. 42) 144, 148 (J.A. 101a-03a)), the memorandum was not sent to anyone in the Air Force or Defense Departments. Indeed, Butterfield never communicated on the subject with anyone in either Department and he never mentioned the subject to the President, with whom he had daily contact. PX 12; Butterfield Dep. (R. 41) 231, 440-43. *See* Laird Dep. (R. 455) 22, 83-84; Seamans Dep. (R. 335) 3-240, -241.

Butterfield's memorandum, in the words of General Alexander Haig, then deputy to the National Security Affairs adviser, was accorded no "particular significance," as there were "literally hundreds of papers of this kind coming through." Haig Dep. (R. 470) 38. Actually, contrary to Butterfield's suggestion, the President himself and his staff did make several attempts to find another position in the federal government for Fitzgerald. Nixon Dep. I (R. 378) 10, 28, 220-24; Nixon Dep. II, 10-14. Apparently, however, the White House's efforts were resisted — the Bureau of the Budget, for example, was reluctant to take Fitzgerald for fear that he would "be a disruptive factor." Schlesinger Dep. (R. 432) 5-7 (J.A.

146a-48a); Mayo Dep. (R. 460) 5-6 (J.A. 126a-27a). Since the Fitzgerald matter was not of overriding importance for the White House, the effort to find another job was displaced, according to Haldeman, by "at least a thousand other items of a magnitude of a hundred times the magnitude of [the Fitzgerald matter]." Haldeman Dep. (R. 418) 102-13. *See* Nixon Dep. I (R. 378) 17-18, 30-31, 160-163.

Fitzgerald's Pursuit of a Civil Service Remedy.

Fitzgerald left government employment on January 5, 1970, when the elimination of his position became effective. On January 20, 1970, Fitzgerald appealed to the Civil Service Commission, which, after proceedings lasting over a three-year period, ruled that "the evidence of record does *not* support [Fitzgerald's] allegation that his position was abolished ... in retaliation for his [Congressional] testimony." J.A. 81a (CSC Decision 16 (emphasis added)). However, the Commission did find that the use of the "reduction-in-force" method of eliminating Fitzgerald's position was wrong, as it "improperly resulted from and was influenced by reasons purely personal to [Fitzgerald]."[3] *Id.* at 19-20 (J.A. 86a). Since the formal requirements of a "reduction-in-force" had not been complied with, the Commission ordered that Fitzgerald be reinstated with back pay. *Id.* at 20-21 (J.A. 87a, 88a).

[3] Apparently, according to the Commission, the Air Force should have instead employed the "adverse action procedures," the current version of which is codified at 5 C.F.R. § 752 (1981). *See* J.A. 67a-69a, 85a-86a (CSC Decision at 6, 19-20). With respect to the "personal" factors surrounding Fitzgerald's dismissal, the Commission found "that the unjust publicity the Air Force received concerning [the civil service] tenure controversy, which it considered Mr. Fitzgerald to be basically responsible for, was the prime factor in the deterioration of relationships and development of an adversary environment between Mr. Fitzgerald and the Air Force." J.A. 82a (CSC Decision at 17). Noting that the Air Force considered Fitzgerald to be "not a 'team player,'" the Commission further observed that "we find [it] difficult to accept [Fitzgerald's denial] that he was 'Senator Proxmire's boy in the Air Force . . . .'" J.A. 83a (CSC Decision at 17).

At the Commission hearings early in 1973, Seamans invoked executive privilege in answer to several questions. Asked about this at his January 31, 1973 press conference, President Nixon said that he stood by the decision to terminate Fitzgerald. However, in a meeting with aides right after the press conference, Nixon privately acknowledged that he had confused the Fitzgerald matter (which, after all, had occurred three years earlier) with the case of Gordon Rule, another Pentagon civil servant who had also been dismissed. Nixon Dep. I (R. 378) 12, 13. The President told John Ehrlichman, "I'm thinking of another guy actually ... I had two names in my mind .... I really didn't know the question, but I had to back up the son of a bitch Seamans." Nixon Pet. App. 18a (transcript of conversation with John Ehrlichman) (J.A. 220a). The next day, the White House press secretary issued a public retraction of Nixon's comments regarding Fitzgerald. Nixon Dep. I (R. 378) 13, 131. PX 84 at pp. 4-5.

Apparently, the President was still confused a month later when Press Secretary Ronald Ziegler informed him that reporters were continuing to pursue the Fitzgerald matter. Upon being told that "when we came in it was all Harlow's ballgame," the President replied, "Bryce was all for canning him, wasn't he?" Ziegler answered, "No, I think Bryce may have been the other way." The President continued, "You see, the case I was thinking about, when you asked me, was the other case — ... the [Gordon] Rule case, that's right." Nixon Pet. App. 28a (transcript of conversation with Ronald Ziegler) (J.A. 282a-83a).

Although reinstated by the Air Force with back pay in 1973, Fitzgerald again appealed to the Civil Service Commission, this time claiming that his new position was not equivalent to his old one. After hearings, a Commission appeals officer ruled that the reinstated position was equivalent, but Fitzgerald appealed this ruling to the federal district court, which on March 3, 1981 overturned it as arbitrary and capricious. *Fitzgerald v. Hampton,* Civ. No. 76-1486 (D.D.C. Mar. 3,

1981).[4] The district court ordered the Air Force to place Fitzgerald in a new position with rank and qualification requirements similar to his old position. *Id.*

The Present Case.

Claiming that reinstatement and back pay was insufficient compensation, Fitzgerald also initiated a civil action in federal district court in January, 1974 against Laird, Seamans, six other high-ranking Air Force and Defense Department officials, and Butterfield, seeking over $3,500,000 in compensatory and punitive damages for the allegedly retaliatory firing. The district court (Gesell, J.) granted defendants' motion for summary judgment based on the statute of limitations, since the suit had been commenced more than three years after Fitzgerald's job had been abolished. *Fitzgerald v. Seamans,* 384 F. Supp. 688 (D.D.C. 1974). Fitzgerald appealed to the Court of Appeals for the District of Columbia Circuit, which affirmed the decision as to all but the one defendant who had nothing to do with Fitzgerald's cause of complaint — Butterfield. Butterfield remained in the suit because, according to the court of appeals, Fitzgerald had no reason before 1973 (when the statutory period ran out) to know of any White House involvement in the decision to abolish his position. *Fitzgerald v. Seamans,* 553 F.2d 220 (D.C. Cir. 1977).

His attempt to sue Pentagon officials having come to naught, Fitzgerald directed his discovery efforts at White House personnel. During the course of extended discovery proceedings, it emerged that Nixon and possibly Harlow might have been peripherally involved in the Fitzgerald matter. In

[4] The *Hampton* case, like the present one, is one of several that Fitzgerald initiated over the loss of his job. In another suit against the Chairman of the Civil Service Commission, he challenged the Commission's rules that required closed hearings and demanded that the hearings on his case be open to the press and the public. *Fitzgerald v. Hampton,* 467 F.2d 755 (D.C. Cir. 1972). He also sought to recover costs and attorneys fees in *Fitzgerald v. United States Civil Service Commission,* 554 F.2d 1186 (D.C. Cir. 1977), and interest on his back pay award in *Fitzgerald v. Staats,* 578 F.2d 435 (D.C. Cir.), *cert. denied,* 439 U.S. 1004 (1978), but both requests were denied as being contrary to the Veterans' Preference Act of 1944.

September, 1978 — almost nine years after the Air Force reorganization — the district court on remand permitted the filing of a Second Amended Complaint adding Nixon and Harlow as defendants. R. 151 (*see* J.A. 16a).

Denial of Summary Judgment on the Immunity Issue.

Despite six years of discovery, Fitzgerald has not succeeded in uncovering a single shred of evidence showing that petitioners Harlow and Butterfield had in any way initiated or approved the Air Force reorganization or had ever initiated any contact with the Air Force or Defense Departments regarding Fitzgerald.

On February 12, 1980, the petitioners filed a new motion for summary judgment on the grounds, *inter alia*, that a grant of absolute immunity was "essential for the conduct of the public business," under *Butz v. Economou*, 438 U.S. 478, 507 (1978), or alternatively, that they were entitled to qualified immunity because Fitzgerald had failed to show any evidence of their wrongful conduct.

On March 26, 1980, the district court, citing *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by an equally divided court*, 452 U.S. ____ (June 22, 1981), as controlling, rejected petitioners' claim of absolute immunity, ruled that the issue of qualified immunity must be submitted to the jury because "[g]enuine issues of fact remain" as to (among other things) the question of malice and bad faith, and denied the motion for summary judgment. Pet. App. 3a.

The petitioners appealed the district court's rejection of their immunity defense to the court of appeals; the respondent filed a motion alternatively seeking dismissal of the appeal or summary affirmance of the district court's order. The respondent argued that, in view of the D.C. Circuit's decision in *Halperin*, the denial of immunity was not appealable at that stage. Although it issued no opinion, the court of appeals evidently concurred with this jurisdictional contention, because on April 30, 1980 it granted respondent's motion to dismiss the appeal and on July 14, 1980 denied petitioners' petition for rehearing and suggestion for rehearing *en banc*. Pet. App. 13a-14a. Since it dismissed rather than affirmed, the court of

appeals obviously did not address the merits of petitioners' immunity defense.

Thus, with discovery and pretrial conferences completed, this protracted case is now poised for trial. Unless this Court decides that respondent has not stated a claim for relief or that the district court's denial of the immunity defense is immediately appealable and erroneous, petitioners will be put to the burden, expense, and risk of a trial that is now estimated to require at least two months and (based on the pretrial witness lists) involve 75 witnesses.

SUMMARY OF ARGUMENT

I

Pretrial denials of the defense of absolute immunity are immediately appealable under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Thus, the court of appeals' dismissal of petitioners' appeal was clearly contrary to the express rulings of this Court and the other courts of appeals. Since "the purpose behind absolute immunity is as much to protect the relevant persons from a trial on their actions as it is to protect them from the outcome of trial .... [t]he full protection of absolute immunity would be irreparably lost if review had to await the final judgment." *Briggs v. Goodwin*, 569 F.2d 10, 59 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978).

As the fundamental purpose of qualified immunity is similarly to avoid the burdens and hazards of a trial, a denial of qualified immunity should be no less appealable than a denial of absolute immunity.

II

Respondent cannot imply a cause of action under the Constitution, 5 U.S.C. § 7211 or 18 U.S.C. § 1505. For this reason, the Court need not reach the questions of official immunity presented by this case. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* precludes the

implication of a constitutional cause of action against federal officials where there are "special factors counselling hesitation." 403 U.S. 388, 397 (1971). Because of the need to accord the government the "widest latitude" in the handling of its internal affairs, it has been recognized that the "unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy." *Bush v. Lucas*, 647 F.2d 573 (5th Cir. 1981). *Bivens* also established that the availability of alternative remedies is relevant to the implication of a constitutional cause of action. In the present case, as in *Bush v. Lucas*, respondent has successfully availed himself of Civil Service Commission relief, has obtained judicial review of that relief, and has been reinstated and granted back pay. Moreover, since respondent's constitutional cause of action is unfounded, his unprecedented assertion of an implied private right of action under the other federal statutes is even less meritorious. This Court has clearly stated in *Davis v. Passman*, 442 U.S. 228 (1979), that statutory causes of action would be implied far less readily than would constitutional ones.

III

A. The justification for absolute immunity is that the fear of civil litigation and damages liability "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). In recognition of this overriding public interest in the effective functioning of government, this Court has extended absolute immunity to judges, prosecutors, legislators, and even to civil service hearing examiners and agency attorneys participating in federal administrative proceedings. *See Butz v. Economou*, 438 U.S. 478 (1978).

B. As articulated in the brief of co-petitioner Nixon, it is clear that the President is entitled to absolute immunity, and it follows that senior advisers whose functions are "essential" to the President's discharge of his constitutional duties should be derivatively entitled to the same immunity. Congressional staff members have a derivative right to the absolute immunity

enjoyed by Members of Congress under the Speech and Debate Clause; surely the rationale for this rule applies with even greater potency to senior advisers to the nation's Chief Executive. Absolute immunity for the President alone would be of little value if his senior advisers were restricted in the "unflinching discharge" of their duties by the fear of potential lawsuits. "The President's need for complete candor and objectivity from advisers calls for great deference from the courts," and, as this Court has previously recognized, these considerations are "fundamental to the operation of Government and [are] inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon,* 418 U.S. 683, 706, 708 (1974). Only those aides who directly advise the President in the performance of his public duties or who are directly and intimately involved in the discharge of those duties require, and thus have a derivative right to, the protection of absolute Presidential immunity.

C. While federal executive branch officials are generally entitled only to qualified immunity against allegations of constitutional deprivations, this Court has recognized that there are "exceptional situations" involving officials who have "special functions" for which the protection of absolute immunity "is essential for the conduct of the public business." *Butz v. Economou, supra,* at 507-08. The activities and responsibilities of senior presidential advisers who deal on a daily basis with matters of critical importance to the nation are clearly "special functions" that independently (apart from the derivative basis noted above) warrant the protection of absolute immunity.

The actions or inactions of the President and his senior advisers, like the decisions of judges and prosecutors (who are absolutely immune), have a direct and far-reaching impact. Yet the President's key advisers are to a far greater extent than judicial officials the objects of constant and sharp public attention, and must often make their decisions under exigencies and pressures that are far more intense. These pressures preclude an independent and detailed investigation of every matter referred to the White House by an executive department, and thus senior Presidential advisers, in deciding which matters warrant further review by the White House staff or the

President himself, must rely on information supplied by the executive department. The sheer number of matters presented to them in this difficult role virtually guarantees that senior Presidential advisers would — absent absolute immunity — be the target of numerous vindictive lawsuits. Indeed, their vulnerability to harassing litigation is illustrated by this very case.

D. Allowing only a qualified immunity, which could be overcome by a showing of the official's unreasonable or bad faith actions, would not provide at the time of decision-making the requisite assurance that the official will be free from the burdens and risks of any potential lawsuit. Even if an effective means of summary disposition of qualified immunity cases were available (*see* Point IV, *infra*), it is still possible that innocent officials would be subject to the burdens of a full trial. The potential for this kind of recurring judicial oversight of White House discretionary activities was clearly not intended by the Framers of the Constitution. Were the President and his senior advisers to be denied absolute immunity, White House advisers such as petitioners here would be faced with the unfair and perhaps impossible task of conveying to a lay jury years later the "grave, complex and unique responsibilities" of the Presidency, and the reasonableness and good faith of their "political [and often] highly controversial acts." *Halperin v. Kissinger*, 606 F.2d 1192, 1214-15 (D.C. Cir. 1980). This would inevitably prove so burdensome as to be "unduly disruptive of the Executive Branch and, therefore, unconstitutional." *Nixon v. Administrator of General Services*, 433 U.S. 425, 445 (1977).

E. The question of precisely which Presidential advisers apart from petitioners here are senior enough to warrant the protection of absolute immunity may be left open for a future case. In any event, the argument that it may be difficult to draw a line as to which officials are entitled to this protection should not be a reason to deny absolute immunity to petitioners here. If the Court desires to resolve this question, it should, in conformity with its prior immunity decisions, balance the "plaintiff's right to compensation with the need to protect the decision-making processes of an executive department." *Butz v. Economou, supra*, 438 U.S. at 503. Under this balancing

approach the need to redress genuine constitutional injuries would be weighed against the need to protect those officials whose policy and decision-making responsibilities are likely to provoke lawsuits by aggrieved individuals. Given the statutory and administrative remedies typically available to a plaintiff injured by White House review of an executive department's action — especially in the area of personnel matters — a grant of absolute immunity would rarely leave plaintiffs without a means of redress for a genuine constitutional injury.

IV

If senior Presidential advisers are not entitled to absolute immunity, either derivatively or because of their "special functions," then they will be entitled under *Butz v. Economou* only to qualified immunity. By typically denying motions for summary judgment, on the ground that the barest allegation of malice or bad faith automatically raises a triable issue of fact, the lower courts have routinely belied the confidence expressed in *Butz* that qualified immunity would prove "workable." Qualified immunity has thus become an illusory defense.

One suggestion for giving life to the defense as envisioned in *Butz* would be to require plaintiff to "establish after the completion of discovery and before the trial commences, not merely the existence of a genuine dispute as to some material issue of fact but also, by the preponderance of the evidence or through clear and convincing evidence, that the official failed to act with subjective or objective good faith." *Halperin v. Kissinger, supra,* 606 F.2d at 1215 (Gesell, J., concurring). To give meaning to the "clear and convincing" requirement and encourage a degree of uniformity and predictability, the lower courts could, in determining the requisite quantum of evidence needed to overcome the defense, consider the same factors used in the balancing approach to absolute immunity discussed above (*i.e.,* the nature and breadth of the official's responsibilities, the strength and sufficiency of the evidence bearing on malice, the remoteness of the defendant from the alleged injurious action, and the availability of alternative remedies).

Under this approach, it is clear that this case is precisely the kind of patently "insubstantial lawsuit" that should have

been "quickly terminated." *Butz v. Economou, supra,* 438 U.S. at 527. The total absence of any evidence whatsoever that petitioners were responsible for the Air Force's decision to eliminate respondent's civil service position unquestionably bars any finding that respondent has met the "preponderance" (much less the "clear and convincing") test. Considering the level and scope of petitioners' duties and responsibilities, the wholly speculative and circumstantial nature of respondent's evidence, petitioners' remoteness from the Air Force decision, and respondent's reinstatement with back pay by order of the Civil Service Commission, respondent has surely not adduced enough evidence to justify putting two senior Presidential advisers through the ordeal of a trial. To force them to trial in the face of this "thin" a record, against these specious claims, would open senior advisers in every administration to the inevitable risks and burdens of trial and would thus cause them to live and govern in fear of financial ruin. This pernicious threat to the administration of government should be eliminated.

ARGUMENT

I. THE DENIAL OF THE IMMUNITY DEFENSES WAS A FINAL, COLLATERAL ORDER, APPEALABLE UNDER *COHEN V. BENEFICIAL INDUSTRIAL LOAN CORP.*

Although respondent has apparently conceded the point (by not addressing it in his brief opposing the Petition)[5], the

[5] Respondent had earlier argued in this Court that this case was not "in" the court of appeals (within the meaning of 28 U.S.C. § 1254), "because that court had granted respondent's motion to dismiss for lack of jurisdiction." Brief for Respondent in Opposition at p. 2, *Nixon v. Fitzgerald,* No. 79-1738. The assertion that this Court has no power to review a court of appeals dismissal for want of jurisdiction is clearly erroneous. *See, e.g., Gardner v. Westinghouse Broadcasting Co.,* 437 U.S. 478 (1978) (*certiorari* granted to review jurisdictional dismissal by court of appeals). As noted above, respondent apparently recognized this and did not reiterate the argument in response to the Petition in No. 80-945. *See* Brief for Respondent, *Harlow & Butterfield v. Fitzgerald,* No. 80-945 (Feb. 9, 1981).

question of the appealability of the denial of petitioners' immunity defenses is so closely related to the rationale for the immunity defenses discussed below that it merits some comment.

The circumstances in which district court orders are immediately appealable under the *Cohen* collateral order doctrine were recently summarized in *Coopers & Lybrand v. Livesay*, in which the Court stated that such orders may be appealed if they (i) conclusively determine the disputed question, (ii) resolve an important question completely separate from the merits of the action, and (iii) are effectively unreviewable on appeal from a final judgment. 437 U.S. 463, 468-69 (1978), *citing Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

These circumstances are present when a district court rejects the defense of absolute immunity. Since "the purpose behind absolute immunity is as much to protect the relevant persons from a trial on their actions as it is to protect them from the outcome of trial .... [t]he full protection of absolute immunity would be irreparably lost if review had to await final judgment." *Briggs v. Goodwin*, 569 F.2d 10, 59 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978) (assertion of witness and prosecutorial immunity). *See Helstoski v. Meanor*, 442 U.S. 500, 508 (1979) (immunity "was designed to protect [officials] 'not only from the consequences of litigation's results, but also from the burden of defending themselves.' "), *quoting Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

Recognizing that any pretrial denial of this defense must be immediately appealable if it is to have any meaning at all, this Court on at least two occasions in recent years has expressly held that denials of immunity defenses are appealable under the *Cohen* collateral order doctrine. *See Helstoski v. Meanor*, *supra* (immunity under the Speech and Debate Clause); *Abney v. United States*, 431 U.S. 651 (1977) (immunity on ground of double jeopardy). Moreover, until the D.C. Circuit's dismissal in this case, all the courts of appeals (including other panels of the D.C. Circuit itself) that had considered the issue were in accord. *See, e.g., Forsyth v. Kleindienst*, 599 F.2d 1203, 1208-09 (3d Cir. 1979), *cert. denied sub nom. Mitchell v. Forsyth*, 453

U.S. ____ (June 29, 1981) (assertion of absolute immunity by Executive Branch officials).[6]

A denial of qualified immunity should be no less appealable than a denial of absolute immunity. In each case, the key function of the defense is to avoid a trial on the merits, and this function would be nullified if appellate review of the defense had to be postponed until final adjudication of the merits of the case.[7] An order denying a defendant's right to avoid a trial on

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[6] The Third Circuit has expressly ruled that

> a pretrial denial of the defendants' motions for summary judgment on the issue of absolute immunity is appealable under the *Cohen* collateral order doctrine. Appellate review . . . [prior to trial] will conclusively determine the disputed question and will resolve an important issue completely separate from and collateral to the question of the defendants' guilt or innocence. Moreover, the denial of absolute immunity is effectively unreviewable on appeal. *Since the right which absolute immunity protects is the right not to be subjected to trial, it is irretrievably lost if appellate review must await final adjudication on the merits.* [*Forsyth v. Kleindienst*, 599 F.2d 1203, 1208-09 (3d Cir. 1979), *cert. denied sub nom. Mitchell v. Forsyth*, 453 U.S. ____ (June 29, 1981) (assertion of absolute immunity by executive branch officials) (emphasis added).]

The Second Circuit is in accord, having recently denied a plaintiff's motion to dismiss an appeal of a pretrial denial of an immunity defense. *Clark v. United States*, 624 F.2d 3, 4(2d Cir. 1980) (briefing permitted by court of appeals on claim of immunity by former President Nixon). Other panels of the District of Columbia Circuit itself have expressly recognized the immediate appealability under the *Cohen* collateral order doctrine of a district court's denial of an immunity defense. *See Dellums v. Powell*, No. 80-1331, slip op. at 4 & n.5, (D.C. Cir. July 24, 1981); *Briggs v. Goodwin, supra; McSurely v. McClellan*, 521 F.2d 1024 (1975), *aff'd in pertinent part en banc*, 553 F.2d 1277, 1283-84 n.18 (D.C. Cir. 1976), *cert. dismissed sub nom. McAdams v. McSurely*, 438 U.S. 189 (1978) (immunity under Speech and Debate Clause).

[7] As the D.C. Circuit said in *Briggs v. Goodwin, supra*,

> To paraphrase *Abney*, even if the defendant here is held not liable in damages, or, if held liable, has his liability ultimately reversed on ... immunity grounds, "*he has still been forced to endure a trial that the* [*doctrine of absolute immunity*] *was*

(footnote continues)

qualified immunity grounds would, to paraphrase the Court's holding in a double jeopardy case,

> constitute a complete, formal, and, in the trial court, final rejection of a ... defendant's [qualified immunity] claim. There are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the [qualified immunity defense]. Hence, *Cohen's* threshold requirement of a fully consummated decision is satisfied. [*Abney v. United States, supra,* 431 U.S. at 659.]

In view of the weight of authority on precisely this issue, it is clear that the district court's denial of petitioners' summary judgment motion was an immediately appealable collateral order, that the court of appeals accordingly had jurisdiction over the appeal under 28 U.S.C. § 1291 and incorrectly declined to exercise it, and that this Court therefore has jurisdiction over this case under 28 U.S.C. § 1254.

II. SINCE RESPONDENT HAS ALREADY AVAILED HIMSELF OF HIS ALTERNATIVE STATUTORY REMEDY, HE CANNOT NOW ASSERT AN IMPLIED CONSTITUTIONAL OR STATUTORY CAUSE OF ACTION.

This Court need not reach the questions of official immunity presented by this case if it does not wish to do so, for the simple reason that the respondent has no cause of action.[8]

(footnote continued)

> *designed to prohibit."* [569 F.2d at 59-60, *quoting Abney v. United States, supra,* 431 U.S. at 662 (bracketed material and emphasis in original).]

There is no reason why this rationale should not also apply to qualified immunity.

[8] Petitioners recognize that the Court in the ordinary course would not consider the question of the existence of an implied constitutional or statutory cause of action in this case, because it was not among the Questions Presented in their *certiorari* petition. However, the question was discussed in the Petition (at p. 14 n.9), and was expressly advanced (and briefed) in the district court as an independent ground for the granting of petitioners' motion for

(footnote continues)

Respondent seeks damages arising from the elimination of his Air Force job. He purports to find the source of his claim to damages in *Bivens v. Six Unknown Named Agents of the*

(footnote continued)

summary judgment. *See* R. 452 (Memorandum of Points and Authorities in Support of Harlow's and Butterfield's Motion for Summary Judgment).

Petitioners now respectfully ask this Court simply to do the converse of what it did in *Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978). There the petitioner asked the Court to grant *certiorari* to review the question of whether the plaintiff had stated a cause of action for violation of his constitutional rights under 42 U.S.C. § 1983. The Court did grant *certiorari* as to that question, but then addressed the question of whether respondents were entitled to official immunity. The immunity and cause of action issues are intertwined, in that the effect of granting immunity and denying a cause of action are the same. Consequently, the Court said that the immunity issue was "fairly comprised" by the cause of action question. *See* Sup. Ct. R. 21.1(a). The Court further noted that "[i]n any event, our power to decide is not limited by the precise terms of the question presented." 434 U.S. at 559-60 n.6.

Petitioners note that this Court has on other occasions not hesitated when appropriate to address issues that were not posed by the parties in their petitioning papers. *See, e.g., Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 48 n.34 (1977); *Rogers v. United States*, 422 U.S. 35, 41 (1975); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 319-20 (1971); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Moreover, this Court clearly has power under 28 U.S.C. § 1254 to review all aspects of any "[c]ases" that are "in the courts of appeals," which this one clearly was. The Court is thus not constrained in deciding cases solely on the legal issues that were expressly before the lower appellate court. Actually, the lower appellate court itself could have addressed these other issues "in conjunction with [its] review of defendants' appeal from the collateral order denying absolute immunity." *Dellums v. Powell*, No. 80-1331, slip op. at 5 n.6 (D.C. Cir. July 24, 1981).

Finally, the interests of judicial economy also suggest that the cause of action question be resolved at this point. The question is squarely presented, and this Court can now dispose of all legal issues in the case. Consequently, it would be a waste of judicial resources, as well as an unfair burden on petitioners, to have to go through the exercise of a trial, only to have the court of appeals (or perhaps this Court) in reviewing the final judgment, determine that there was no cause of action after all.

Federal Bureau of Narcotics, 403 U.S. 388 (1971), and *Davis v. Passman*, 442 U.S. 228 (1979), both of which found an implied right of action for damages arising from the violation of constitutional rights. On the facts of this case, however, it is clear that he has no constitutional cause of action. Just last year, in *Carlson v. Green* this Court held that

> *Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Such a cause of action may be defeated in a particular case ... when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." [446 U.S. 14, 18 (1980), *quoting Bivens v. Six Unknown Named Agents, supra*, 403 U.S. at 396.]

As the Fifth Circuit has noted in a case remarkably similar to petitioners', the "unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy" because the federal government should be accorded the "widest latitude" in the handling of its internal affairs.[9] *Bush v. Lucas*, 647 F.2d 573, 576 (5th Cir. 1981), *affirming on remand* 598 F.2d 958 (5th Cir. 1979). Bush was a NASA engineer who claimed that his First Amendment rights had been violated by reason of a demotion allegedly made in retaliation for criticizing his own job in a television interview. 598 F.2d 958. On remand from this Court after *Carlson*, the court of appeals ruled that the plaintiff lacked a constitutional cause of action.

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[9] *Cf. Sonntag v. Dooley*, 650 F.2d 904, 907 (7th Cir. 1981), *rev'g* 495 F.Supp. 348 (N.D.Ill. 1980). There, the former curator of a military museum claimed that alleged mistreatment by U.S. Army officers forced her to retire and thus violated her Fifth Amendment rights. The court of appeals, noting that no alternative remedy had been available to the plaintiff, held that the defendant Army officers had "not demonstrated 'special factors counseling hesitation' under *Carlson* because they do not enjoy 'such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate.' " *Id., quoting Carlson v. Green, supra*, 446 U.S. at 19.

647 F.2d 573. In so deciding, the Fifth Circuit stressed the efforts Congress had taken to strike a careful balance between "the employee's rights as a citizen" and "the Government's interest in the efficient conduct of the nation's business":

> The very comprehensiveness of the legislative and administrative scheme evinces Congress' awareness of the special relationship and of the Government's responsibilities toward its civil service employees.
>
> The employer-employee context of this case serves to distinguish it from suits such as *Bivens* and *Carlson* which involved plaintiffs as private citizens seeking damages against agents of the Government acting in its sovereign capacity. Inferring a *Bivens* remedy in this case would tend to interfere with and undermine the traditional control of the Government over its internal and personnel affairs. It might encourage aggrieved employees to bypass the statutory and administrative remedies in order to seek direct judicial relief and thereby deprive the Government of the opportunity to work out its personnel problems within the framework it has so painstakingly established. [*Id.* at 577.]

These principles are equally applicable here. Indeed, this case is indistinguishable from *Bush v. Lucas*: both plaintiffs had availed themselves of Civil Service Commission relief; both had obtained judicial review of that relief; and both were reinstated with back pay.[10] Respondent has the same "unique relationship" to the federal government as did the civil servant plaintiff

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[10] In *Carlson v. Green* this Court expressly held that the availability of substitute remedies is relevant to the implication of a constitutional cause of action. Indeed, the "balance, completeness, and structural integrity" of the legislative and administrative scheme for redress of civil servants' claims led this Court in *Brown v. General Services Administration*, 425 U.S. 820 (1976), to rule that the federal statutes (there, § 717 of the Civil Rights Act of 1964) provide "the exclusive judicial remedy for claims of discrimination in federal employment."

Fitzgerald's Air Force position was in the "excepted service" and was consequently not subject to the protection afforded by the Civil

(footnote continues)

in *Bush*, and inferring a *Bivens* cause of action here would also "tend to interfere with and undermine the traditional control of the Government over its internal and personnel affairs." *Id.* Indeed, in view of the breadth and importance of petitioners' responsibilities, the rationale for allowing them "wide latitude" in the handling of internal governmental affairs applies even more strongly here than it did in *Bush v. Lucas*. Accordingly, this Court should hold that, on the facts of this case, respondent has no cause of action for damages for any alleged violation of his constitutional rights.[11]

(footnote continued)

Service Rules and Regulations for the competitive service. *Fitzgerald v. Hampton*, 467 F.2d 755, 758 (D.C. Cir. 1972). *See* J.A. 63a-64a (CSC Decision at 3). But in *Hampton*, the court of appeals ruled that "Fitzgerald's employment is under *legislative protection*," since he was a "preference eligible" veteran and was entitled to a hearing before the Civil Service Commission. 467 F.2d at 762 (emphasis in original). As in *Bush v. Lucas*, the *Hampton* court found that Congress had created an elaborate mechanism to protect the employment rights of "preference eligibles" such as Fitzgerald:

> In enacting the Veterans Preference Act, Congress carefully outlined the preference to be given veterans who are seeking government employment, the circumstances under which they can be reduced in rank, the reasons for which they can be removed, and the procedures which the agencies are to follow in any such actions involving a veterans' preference eligible employee.
>
> . . . Clearly Congress intended to give preference eligible employees rights which would assure them of additional security in their public employment not enjoyed by unprotected federal employees. . . . [*Id.*]

[11] The very reasons that compel the conclusion that there is no constitutional cause of action also serve to deny respondent any implied private rights of action under statutes protecting the right of federal civil service employees to petition Congress (5 U.S.C. § 7211), and making it a crime to obstruct Congressional testimony (18 U.S.C. §1505). These statutory claims have even less merit than his constitutional cause of action, because this Court made it clear in *Davis v. Passman, supra*, that statutory causes of action would be implied far less readily than would constitutional ones. Whether a private right of action for damages can be implied under these statutes is, as this Court has made clear, a question of Congressional intent. *See Texas Industries, Inc. v. Radcliff Materials*, 451 U.S. ____ (May

(footnote continues)

III. COMPELLING CONSIDERATIONS OF PUBLIC POLICY REQUIRE THAT SENIOR PRESIDENTIAL ADVISERS BE ACCORDED ABSOLUTE IMMUNITY.

A. Absolute Immunity Safeguards the "Unflinching Discharge" of Public Responsibilities.

Immunity from civil damages is "not a badge or emolument of exalted office." *Barr v. Matteo*, 360 U.S. 564, 572 (1959). It " 'is not for the protection or benefit of a malicious or corrupt . . . [official], but for the benefit of the public.' " *Imbler v. Pachtman*, 424 U.S. 409, 418 n.12 (1976), *quoting Pierson v. Ray*, 386 U.S. 547, 554 (1967). *See Tenney v.*

(footnote continued)

26, 1981); *Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche, Ross & Co. v. Redington*, 442 U.S. 560 (1979). There is no indication on the face of either of the two statutes on which respondent relies that Congress intended to provide for a private right of action. Nor can respondent point to any such indication in the legislative history. Indeed, the fact that Congress provided for other remedies in those statutes is itself persuasive evidence that Congress did *not* intend to provide for the additional remedy of damages. *See Transamerica Mortgage Advisers, Inc. v. Lewis, supra*, 444 U.S. at 19-21; *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 419 (1975). A civil servant who claims 5 U.S.C. § 7211 has been violated has the full panoply of civil service remedies available to him. And of course, Congress specified penal sanction for the violation of 18 U.S.C. § 1505. Moreover, respondent is not even a member of the class for whose benefit the statutes were enacted. 5 U.S.C. § 7211 and 18 U.S.C. § 1505 were designed to protect the legislative process, not to give one such as Fitzgerald a right to seek damages. *Cf. Odell v. Humble Oil & Refining Co.*, 201 F.2d 123 (10th Cir.), *cert. denied*, 345 U.S. 941 (1953) (plaintiffs suing for employment discharge allegedly in retaliation for their grand jury testimony held not entitled to any right of action under the related statute of 18 U.S.C. § 1503, because that statute was enacted not for the benefit of the plaintiff, but for the "protection of the administration of justice" and "in the interest of the public").

Moreover, even if respondent had an implied statutory cause of action, petitioners would be absolutely immune from liability under it. *Butz v. Economou*, 438 U.S. 478 (1978), held that federal executive officials were entitled only to qualified immunity when a constitutional cause of action was asserted, but retained their absolute immunity in all other cases. *See Barcelo v. Brown*, 478 F.Supp. 646, 662 (D.P.R. 1979), *vacated in part and remanded*, 643 F.2d 835 (1st Cir. 1981).

Brandhove, 341 U.S. 367, 377 (1951) ("Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good.") (Frankfurter, J.).

The classic statement of the policy underlying immunity is that of Judge Learned Hand:

> The justification for...[granting immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. [*Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).]

This concern for the effective functioning of government has led to the granting of absolute immunity to judges, prosecutors, and legislators — and even to civil service hearing examiners and agency attorneys participating in federal administrative proceedings — on the ground that their positions were "functionally comparable" to those of a judge and prosecutor. *See Stump v. Sparkman*, 435 U.S. 349 (1978) (judicial immunity); *Imbler v. Pachtman, supra* (prosecutorial immunity); *Gravel v. United States*, 408 U.S. 606 (1972) (Congressional immunity); *Tenney v. Brandhove, supra* (immunity for state legislators); *Butz v. Economou*, 438 U.S. 478, 513, 517 (1978) (immunity for hearing examiners and agency attorneys). Absolute immunity interposes a complete barrier against civil suit and damages, even in cases where the accused official acted with malice or bad faith or did not have a reasonable ground to believe his action was legal, since, as Judge Hand explained, "it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Gregoire v. Biddle, supra*, 177 F.2d at 581.

In acknowledging the "special functions" of judges, prosecutors and other quasi-judicial officials, this Court has recognized the necessity for absolute immunity because of the inhibiting effect that the prospect of a trial and liability for damages would have on public decision-making. *Butz v. Economou, supra,* 438 U.S. at 508. Such officials are highly visible and exposed to vindictive suits by persons claiming to be aggrieved by the officials' performance of their public duties. *Id.* at 508-12. For example, in the case of prosecutors the Court has noted:

> The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. [*Imbler v. Pachtman, supra,* 424 U.S. at 424-25.]

As pointed out below, this rationale for absolute immunity is even more applicable to the President and his senior advisers than to judges, legislators, prosecutors, and other quasi-judicial officials.

B. Senior Presidential Advisers Are Derivatively Entitled to Absolute Presidential Immunity.

The rationale for absolute Preidential immunity is persuasively articulated in the brief of co-petitioner Nixon, and petitioners Harlow and Butterfield adopt the arguments presented there, to the extent that a senior Presidential adviser's immunity may be considered to be derivative from that of the President himself.

In *Eastland v. United States Servicemen's Fund,* 421 U.S. 491 (1975), this Court held that high-level Congressional aides, in that case a chief counsel to a Congressional subcommittee, have a derivative right to the same absolute immunity enjoyed by Congressmen under the Speech and Debate Clause, to the extent that the aides' activities are "essential to legislating." 421 U.S. at 508, *quoting Gravel v. United States,* 408 U.S. 606, 621

(1972). *See also Doe v. McMillan*, 412 U.S. 306 (1973). *Cf. Dombrowski v. Eastland*, 387 U.S. 82 (1967). In *Gravel*, another Speech and Debate Clause case, the Court expressly ruled that

> [f]or the purpose of construing the privilege [of immunity] a Member and his aide are to be "treated as one." [T]he day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the ... [immunity] will inevitably be diminished and frustrated ... [The immunity] applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected ... act if performed by the Member himself. [*Gravel v. United States, supra*, 408 U.S. at 616-18, *quoting United States v. Doe*, 455 F.2d 753, 761 (1st Cir. 1972).]

Surely the rationale for a rule extending immunity to the Senator's aide in *Gravel* applies with even greater potency to senior advisers to the nation's Chief Executive.

Thus, senior Presidential aides, such as petitioners here, should be derivatively accorded the same absolute immunity as the President, because the functions they perform are "essential" to the President's discharge of his constitutional duties. Obviously the President cannot be expected to do everything himself. As this Court has previously recognized, the President is crucially dependent on obtaining uninhibited advice from his senior staff:

> The President's need for complete candor and objectivity from advisers calls for great deference from the courts.
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> ....
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> ... Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.
>
> ....

> . . . [There is a] necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking .... [T]hose who assist [the President] must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. *These...considerations...[are] fundamental to the operation of Government and [are] inextricably rooted in the separation of powers under the Constitution.* [*United States v. Nixon*, 418 U.S. 683, 705-06, 708 (1974) (emphasis added) (privilege for confidential Presidential communications is subordinate only to specific need in criminal prosecution).]

Having already acknowledged that a senior staff of advisers is an indispensable element of the modern Presidency, the Court should grant the same protection to these advisers as is now enjoyed by legislators' aides.[12] Not all White House staff members should be derivatively entitled to absolute Presidential immunity, for they do not all need its protection. However, those who directly advise the President in the performance of his public duties or who are directly and intimately involved in the discharge of those duties do require the protection of immunity. Absolute immunity for the President alone would be of little value if his senior advisers were restricted in the "unflinching discharge" of their duties by the fear of subsequent lawsuits.

C. The "Special Functions" Performed by Senior Presidential Advisers Require that They Be Accorded Absolute Immunity.

In the case of prosecutors, judges and officials exercising quasi-judicial functions, the rationale for immunity has been

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[12] As Mr. Justice Harlan observed in *Barr v. Matteo, supra*, which extended absolute immunity to an Acting Director of the District of Columbia Office of Rent Stabilization:

> The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy. [360 U.S. at 573 (footnote omitted).]

thought so compelling that, as previously noted, these officials have been granted absolute immunity from claims arising under both state law and the Constitution. *Butz v. Economou, supra,* 438 U.S. at 508-17.

Officials of the federal executive branch acting "within the outer perimeter of [their] line of duty" have been granted absolute immunity from civil actions on state tort claims. *Barr v. Matteo, supra,* 360 U.S. at 575. However, in cases involving alleged deprivations of constitutional rights, this Court has recently held that executive branch officials (even Cabinet-level ones) are generally entitled to only a qualified immunity. *Butz v. Economou, supra.* But even in the case of constitutional torts the Court nonetheless expressly recognized that there were certain officials whose "special functions" placed them in "exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Id.* at 507-08. The inclusion of senior Presidential advisers in this special category would thus entitle them to absolute immunity on a basis independent of its derivation from the President himself.

Indeed, it would be hard to think of any group of officials so clearly embraced by the *Butz* language as are Presidential advisers. Their absolute immunity is essential for the conduct of public business. They deal every day with matters of critical importance to the nation. Their actions and failures to act have at least as direct and far-reaching an impact as the decisions of judges and prosecutors. A President's key staff members are far more frequently in the public eye than most judicial branch officials. Their exposure to harassing litigation is illustrated by this very case. As Judge Gesell, sitting by designation on the appellate panel in *Halperin,* noted:

> [It is a] fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected

> areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discover [sic] is wide-ranging, time-consuming, and not without considerable cost to the officials involved.
>
> ....
>
> The effect of this development upon the willingness of individuals to serve their country is obvious. Not only are the personal funds of such officials placed at hazard but many of these cases are political in character, involve highly controversial acts, and will necessarily embroil juries in passing upon the intricacies of executive decisionmaking. [*Halperin v. Kissinger, supra,* 606 F.2d at 1214 (Gesell, J., concurring).]

Many, if not most, of the matters reaching the White House come to it from an executive department. The complexity and scope of these matters will often "arouse the most intense feelings" in the political arena. *Butz v. Economou, supra,* 438 U.S. at 509 n.36, *quoting Pierson v. Ray, supra,* 386 U.S. at 554. It is an essential function of a Presidential adviser to decide which matters warrant review by the White House staff and the President himself, as well as to suggest a decision on the merits. The senior White House adviser is daily called upon to second-guess decisions of executive departments. Indeed, the sheer number of matters presented to him in this difficult role virtually guarantees that the senior Presidential adviser would — absent absolute immunity — be the target of numerous vindictive lawsuits.

Moreover, the adviser's decisions on the "grave, complex and unique" problems confronting the White House (*Halperin v. Kissinger, supra,* 606 F.2d at 1215 (Gesell, J., concurring)) must often be made under exigencies and political pressures far more intense than those to which judicial and prosecutorial decisions are subjected. These exigencies and pressures preclude an independent and detailed investigation of every matter referred to the White House by an executive department, and

thus the adviser, in making threshold determinations as to which matters warrant White House action, is entitled to rely on information supplied by the executive department. The Court has previously taken note of the unique circumstances of high-level executive officials, and, in an immunity suit involving a Governor and high-level state officers, has observed:

> In the case of higher officers of the executive branch ... the inquiry is far more complex since the range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions — is virtually infinite ... [O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office. [*Scheuer v. Rhodes,* 416 U.S. 232, 246 (1974).]

Just as the possibility of anything less than absolute immunity for judicial and prosecutorial officials would have "an adverse effect" (*Butz v. Economou, supra,* 438 U.S. at 510) on the judicial system, so too would the elimination of absolute immunity for senior Presidential advisers have an inhibiting effect on the flow of information and ideas within the White House. "It simply defies logic and common experience to suggest that officials will not have [the fear of litigation] in the back of their minds when considering what official course to pursue." *Id.* at 526-27 (Rehnquist, J., concurring and dissenting in part).

D. Anything Less than Absolute Immunity for Senior Presidential Advisers Would Not Adequately Serve the Public Interest.

Since the fundamental purpose of immunity is to eliminate the pernicious conflict between discharging public responsibilities and the fear of litigation and liability, the official must be assured, at the time of decision-making, that he will be free from the burdens and risks of any potential lawsuit. The minority in *Butz* pointed out that if an official "may never know until inquiry by a trial court whether there is a possibility that vexatious constitutional litigation will interfere with his

decisionmaking process, the [official] will obviously think not only twice but thrice about ..." making a decision having the potential to provoke litigation. *Butz v. Economou, supra,* 438 U.S. at 527 (Rehnquist, J., concurring and dissenting in part). Consequently, these inhibiting effects will not be eliminated by a grant of qualified immunity, because that defense can be overcome by showing that the official had no reasonable grounds to believe his action was legal or that he acted with malice or bad faith. *Id.* at 497-98, *citing Scheuer v. Rhodes, supra,* 416 U.S. at 247-48 (1974). *See Wood v. Strickland,* 420 U.S. 308, 322 (1975).

Qualified immunity, at least as it is now understood by the lower courts,[13] affords no threshold protection, as it routinely entails a full trial on the good faith element of the defense. This was explicitly recognized by the court of appeals in *Halperin* (606 F.2d at 1209, 1214), and by the minority in *Butz,* which observed that "summary judgment on affidavits and the like is even more inappropriate when the central, and perhaps only, inquiry is the official's state of mind." 438 U.S. at 527 (Rehnquist, J., concurring and dissenting in part).

The trial typically required in qualified immunity cases, where senior advisers will have to reveal "the intricacies of executive decisionmaking" (*Halperin v. Kissinger, supra,* 606 F.2d at 1214 (Gesell, J., concurring)), would run counter to both the constitutional separation of powers doctrine and the privilege for confidential Presidential communications recognized in *United States v. Nixon, supra.* Historical and policy considerations alike militate against the kind of recurring judicial oversight of White House discretionary actions that would occur were the President and his senior advisers to be denied absolute immunity. The framers of our constitutional scheme foresaw that the system of checks and balances as well as the political constraints of the election process and public opinion would serve to detect and deter abuses of power. They did not intend that there should be routine intrusion by the judicial branch into the Chief Executive's office—yet absent absolute immunity, senior Presidential advisers will be subject

[13] *See* discussion in Point IV, *infra,* at pp. 40-43.

to litigious harassment and will frequently have to justify their decisions to juries in civil damages suits. The consequences would inevitably prove so burdensome as to be "unduly disruptive of the Executive Branch and, therefore, unconstitutional ...." *Nixon v. Administrator of General Services*, 433 U.S. 425, 445 (1977). An example of just how "unduly disruptive" such litigation can be is this case, which demonstrates how a plaintiff can piece together a few bits of evidence, speculate as to wrongful conduct, spin out some theory of action, and ensnare a President and two of his senior advisers in years of vexatious discovery, depositions and pretrial skirmishes.

Moreover, even if effective means of summary disposition of qualified immunity cases were available (*see* Point IV, *infra*), it is still possible that innocent officials would be put to the risk of persuading a jury years later that their "political [and often] highly controversial acts" were reasonable and in good faith. *Halperin v. Kissinger, supra*, 606 F.2d at 1214 (Gesell, J., concurring). To paraphrase this Court's comment in a case involving legislative immunity, "[i]n times of political passion, dishonest or vindictive motives are readily attributed to ... [White House] conduct and as readily believed. Courts are not the place for such controversies." *Tenney v. Brandhove, supra*, 341 U.S. at 378 (1951) (Frankfurter, J.).

At trial, senior Presidential advisers would be faced with the perhaps impossible task of conveying to a lay jury the "grave, complex and unique responsibilities" (*Halperin v. Kissinger, supra*, at 1215) of White House advisers and the pressures and urgency under which these responsibilities must be discharged. The difficulties and unfairness of this type of retrospective assessment impelled this Court in *Imbler v. Pachtman, supra*, to extend an absolute, rather than a qualified, immunity to state prosecutors:

> [I]f the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

....

> ... The presentation of [complicated aspects of a prosecutor's duties] in a ... [personal damages] action often would require ... the resolution of some technical issues by the lay jury. It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.
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> ....
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> ...[T]he alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of [government]. [*Imbler v. Pachtman, supra,* 424 U.S. at 425-28.]

This rationale is equally if not more compelling in the case of senior Presidential advisers. Because "an official may later find himself hard put to it to satisfy a jury of his good faith" (*Gregoire v. Biddle, supra,* 177 F.2d at 581), immunity " 'would be of little value if ... [a senior Presidential adviser] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against [him] based upon a jury's speculation as to motives.' " *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 405 (1979), *quoting Tenney v. Brandhove, supra,* 341 U.S. at 377 (Frankfurter, J.).

Given the inhibiting effect of the uncertainties consequent upon qualified immunity, it is therefore essential for the effective functioning of government that senior Presidential advisers be freed by absolute immunity from the "constant dread of retaliation." *Gregoire v. Biddle, supra,* 177 F.2d at 581.

E. Whether by Reason of the Particular Facts of this Case or a General Balancing Test, Petitioners Here Are Entitled to Absolute Immunity.

Petitioners here are undoubtedly within the "special functions" category. They had broad, discretionary responsibilities, played a part in literally hundreds of matters of Presidential concern, and were directly charged by the President with carrying out his orders. The proper discharge of their duties was quintessentially of the kind requiring the protection of absolute immunity. Moreover, it is beyond question that in giving an assessment of Congressional reaction to the Secretary of the Air Force and in giving a recommendation to one's immediate superior on a matter that had attracted Presidential attention, petitioners Harlow and Butterfield were acting "within the outer perimeters of [their] line of duty." *Barr v. Matteo, supra,* 360 U.S. at 575.

In response to the policy considerations in the public interest to extend absolute immunity to senior Presidential advisers, respondent's chief argument is that to do so would make it difficult in future cases to draw a line between those officials who are and those officials who are not entitled to the protection of absolute immunity. Brief for Resp. at 22-23 & n. 14 (Feb. 9, 1981). If this sort of argument were to be taken seriously, no classification could ever be made in any situation. Granted that not all executive branch officials or even all White House staff members should be entitled to absolute immunity, it is sufficient for purposes of this case that the controlling considerations of public policy justify granting absolute immunity to these petitioners.

It is not true, in any event, that no rational basis can be found for drawing the necessary line. A basis for doing so can be found in *Barr v. Matteo, supra,* where the Court noted that

> the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted — the relation of the act complained of to "matters committed by law to his control or

> supervision" ..., — which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil ... suits. [360 U.S. at 573-74, *quoting Spalding v. Vilas*, 161 U.S. 483, 498 (1896).]

The balancing of factors implicit in *Barr* was made explicit in *Butz*, when the Court said that it must "reconcile the plaintiff's right to compensation with the need to protect the decision-making processes of an executive department." *Butz v. Economou, supra*, 438 U.S. at 503. The first element of this balancing test takes into account the extent to which the barrier to suit consequent upon the grant of absolute immunity would leave unredressed a genuine constitutional injury. The aim of affording a remedy to citizens who have experienced constitutional deprivations at the hands of federal officials was the explicit basis for this Court's decision in *Davis v. Passman, supra*. It was also the basis for the restriction on absolute immunity laid down by *Butz v. Economou, supra*. Although the availability of an alternative remedy should not of course be the sole factor determining whether a particular federal official, irrespective of his level of responsibility, should receive absolute immunity, it would clearly be relevant.[14] Indeed, as noted above in Point II, granting absolute immunity for constitutional torts arising from White House review of an executive department action would rarely, given the statutory and administrative remedies typically available in such situations, leave plaintiffs without a remedy.

The "need to protect the decision-making processes of an executive department" forms the second element of the balancing test. This addresses the degree to which the official's policy and decision-making responsibilities—whether by reason of their far-reaching nature, subject matter, political visibility,

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[14] In *Imbler v. Pachtman, supra*, 424 U.S. at 427, 428 n. 27, the Court expressly noted that the availability of an alternative remedy was relevant to the decision to grant absolute immunity to state prosecutors. The alternative remedy there was a collateral, post-conviction *habeas corpus* action.

complexity or otherwise — are likely to provoke lawsuits by individuals claiming an "unconstitutional animus." *Butz v. Economou, supra,* at 512. Obviously, the greater the level of responsibility and breadth of discretion vested in the official, the more likely that matters of great public importance will be adversely affected by any deterrent to the "unflinching discharge" of his official duties. *Gregoire v. Biddle, supra,* 177 F.2d at 581. Moreover, officials — such as White House advisers — whose roles require that they review or take part in numerous decisions are more likely to be the target of lawsuits than officials who deal with only a limited range of matters. Even small and trivial lawsuits "could impose unique and intolerable burdens" upon officers charged with wide-ranging responsibilities. *Imbler v. Pachtman, supra,* 424 U.S. at 425-26.

Petitioners, by reason of their "special functions" as senior White House advisers, are well within the protected side of whatever line is suggested by these considerations. All of the factors bearing upon the effective functioning of government militate strongly in favor of giving them absolute immunity. The level and scope of their responsibility demands — for the benefit of the public — the protection thus afforded. Moreover, the very subject of the action that is the focus of this case, namely, a personnel decision, is the type of decision that is perhaps most prone to provoking damages suits by those affected.

Finally, allowing petitioners immunity would hardly leave Fitzgerald remediless: after Civil Service Commission review of the Air Force's decision and judicial review of the Commission's decisions, he has been reinstated with back pay. He now seeks additional, extraordinary relief for an injury arising out of the same incident for which he has already been compensated. The granting of absolute immunity to these senior Presidential advisers is under such circumstances fully warranted and, indeed, required.

IV. THIS COURT SHOULD CLARIFY THE STANDARD FOR PRETRIAL DISPOSITIONS OF QUALIFIED IMMUNITY CASES BECAUSE THE LOWER COURTS HAVE VITIATED THE DEFENSE BY ROUTINELY ALLOWING SUCH CASES TO PROCEED TO TRIAL.

A. Qualified Immunity, as Envisioned in *Butz v. Economou*, Has Not Proven "Workable."

If senior Presidential advisers faced with allegations of unconstitutional conduct, such as petitioners here, are deemed not entitled to absolute immunity, either derivatively or because they do not perform "special functions requir[ing] a full exemption from liability," *Butz v. Economou* would remit them to qualified immunity. 438 U.S. at 507-08. Qualified immunity, however, was not intended to be an illusory defense. On the contrary, the *Butz* majority stressed the point that the "principle of only qualified immunity for constitutional violations ... should prove ... workable" because its key purpose — namely, to avoid a trial on the merits — would be achieved by summary disposition of unsupported claims:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading .... [D]amages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity .... In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits. [*Id.* at 507-08.]

Unconvinced by this assurance, the minority pointed out "that anytime a plaintiff can paint his grievance in constitutional colors," the defendant will be forced to go to trial on the good faith element of the defense. *Id.* at 520 (Rehnquist,

J., concurring and dissenting in part). The minority warned that

> if we allow a mere allegation of unconstitutionality, obviously unproved at the time made, to require a Cabinet-level official, charged with the enforcement of the responsibilities to which the complaint pertains, to lay aside his duties and defend such an action on the merits, the defense of official immunity will have been abolished in fact if not in form. The ease with which a constitutional claim may be pleaded in a case such as this, where a violation of statutory or judicial limits on agency action may be readily converted by any legal neophyte into a claim of denial of procedural due process under the Fifth Amendment, will assure that. The fact that the claim fails when put to trial will not prevent the consumption of time, effort, and money on the part of the defendant official in defending his actions on the merits. The result can only be damage to the "interests of the people," ... which "require[s] that due protection be accorded to [Cabinet officials] in respect of their official acts." [*Id.* at 522, *quoting Spalding v. Vilas*, 161 U.S. 483, 498 (1896) (brackets in original).]

Subsequent cases have demonstrated the prescience of this warning.[15] The results in the lower courts have all too often belied the confidence expressed by the *Butz* majority. Trial judges have consistently found that "practical difficulties"

[15] In dissenting from a denial of *certiorari* in *Hanrahan v. Hampton*, 446 U.S. 754 (1980), Mr. Justice Powell observed that the Court's decision in *Butz* "would invite litigation in which constitutional claims easily are asserted." *Id.* at 765 (Powell, J., concurring and dissenting in part). But the Court recognized "that extravagant charges might force officials to trial on claims that lacked a substantial basis in fact," and it "therefore cautioned the judiciary ... to protect official defendants from groundless claims." *Id.* However, in that case, as in the present one, "the record [was] wholly 'devoid of proof of ... participation' by the federal defendants in the conspiracy alleged." *Id.* To proceed to trial in that case would mean that "similar allegations could survive properly supported motions for summary judgment on the basis of speculative inferences from unrelated evidence." *Id.* This, Mr. Justice Powell remarked, "vitiates the protection we sought to insure in *Butz*." *Id.* at 765-66.

(*Halperin v. Kissinger, supra,* 606 F.2d at 1214 (Gesell, J. concurring)) stood in the way of this Court's admonitions to provide summary disposition. They have instead routinely denied motions for summary judgment on the ground that the claim of malice or bad faith automatically raised a triable issue of fact as to the defendant's state of mind. Indeed, they have treated a plaintiff's mere allegation of malice (occasionally supported by some circumstantial inference) as creating such an issue.[16]

The district court's denial of petitioners' motion for judgment on the issue of qualified immunity is typical of this tendency to avoid summary disposition. In his separate opinion in *Halperin,* Judge Gesell himself served notice that he would reluctantly be compelled to send qualified immunity cases to the jury:

> If a plaintiff can establish a genuine material issue of fact as to any element of the immunity defense the case will have to proceed to trial. In my view this approach substantially undermines, if not destroys, the immunity doctrine.
>
> ....
>
> ... It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the

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[16] *See Clark v. United States,* 481 F.Supp. 1086, 1092-93 n.5 (S.D.N.Y. 1979), *appeal dismissed in part and stayed in part,* 624 F.2d 3, 4 (2d Cir. 1980) (mere pleading of malice sufficient to prevent dismissal on qualified immunity ground). *See also Halperin v. Kissinger, supra; Forsyth v. Kleindienst,* 599 F.2d 1203 (3d Cir. 1979), *cert. denied sub nom. Mitchell v. Forsyth,* 453 U.S. ____ (June 29, 1981); *Smith v. Nixon,* 606 F.2d 1183 (D.C. Cir. 1979), *cert. denied,* 453 U.S. ____ (June 29, 1981); *Zweibon v. Mitchell,* 606 F.2d 1172 (D.C. Cir. 1979), *cert. denied,* 453 U.S. ____ (June 29, 1981); *Dellums v. Powell,* 490 F. Supp. 70 (D.D.C. 1980), *aff'd in part and rev'd in part,* No. 80-1331, slip op. (D.C. Cir. July 24, 1981). *See generally* Friedman, "The Good Faith Defense in Constitutional Litigation," 5 Hofstra L. Rev. 501, 519 n.114 (1977); Note, "Presidential Immunity from Constitutional Damage Liability," 60 B.U.L. Rev. 879, 906 n.211 (1980).

> immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient. In short, if these standards are those to be followed in these cases, trial judges will almost automatically have to send such cases to full trials on the merits. [*Halperin v. Kissinger, supra,* 606 F.2d at 1214 (Gesell, J., concurring).]

By habitually requiring that qualified immunity cases proceed to full trials, the district courts have embarked on a course that frustrates the policy of immunity generally and, in the specific case of Presidential advisers, directly contravenes the constitutional underpinnings of the immunity defense. As noted in Point III above, the recurring judicial intrusion into White House decision-making that is inevitable in qualified immunity trials runs counter to the separation of powers and the protection of confidential Presidential communications.

B. This Case Itself Shows How The Qualified Immunity Defense Has Been Vitiated.

The instant case is itself an egregious example of the disregard in practice of this Court's admonitions to "weed out insubstantial claims." *Butz v. Economou, supra,* 438 U.S. at 527. After more than seven years of litigation, and after exhaustive discovery yielding thousands of pages of depositions and hundreds of pages of White House documents, Fitzgerald has been unable to uncover any evidence whatever showing that petitioners had a part in the decision to eliminate his job. There is no evidence of a conspiracy to these ends. Yet petitioners have been denied summary judgment because Judge Gesell felt himself bound by the controlling precedent in the D.C. Circuit's decision "to extend no more protection to top federal officials than is afforded by the normally applicable summary judgment principles." *Halperin v. Kissinger, supra,* 606 F.2d at 1214 (Gesell, J., concurring). The inference is inescapable, in light of Judge Gesell's concurring opinion in *Halperin,* that had it not

been for the appellate panel's decision in that case he would have granted petitioners' motion here.[17]

Harlow and Butterfield were called upon daily to give their views and advice on questions that might affect the interests of all kinds of individuals and groups. Fitzgerald's job status was one of countless such matters. If respondent can force this lawsuit to trial, then so too can almost any of the hundreds of other individuals or groups aggrieved by government decisions in which Presidential advisers like Harlow and Butterfield had some fleeting or tangential role. No senior Presidential adviser would be immune from suit; an enterprising plaintiff whose case had attracted public attention could always find some meeting or telephone call or memorandum in which his situation had been discussed. And taking that as a foundation, some theory of causality and liability could be fabricated.

Allegations of malice and civil conspiracy, weakly supported by factual inferences drawn from the slightest bits and pieces of evidence, should no longer be allowed to serve as a simple formula for defeating the pre-trial protection of qualified immunity. For if this formula is not struck down, senior advisers in every administration can never escape the inevitable risks and burdens of trial and will always live and govern in fear of financial ruin. It is time to end this pernicious threat to the administration of government.

C. A Higher Evidentiary Burden Should Be Required to Defeat Summary Judgment on the Ground of Qualified Immunity.

To give life to the defense of qualified immunity as envisioned in *Butz*, the sufficiency of plaintiff's pleading and evidence must be held to a more exacting standard. One

[17] Indeed, Judge Gesell, sitting as the district court, even declined to hear oral argument on the immunity issue in connection with the summary judgment motion, although he permitted argument on other issues.

practical approach to making summary disposition more readily available was suggested by Judge Gesell in his separate opinion in *Halperin:*

> In order to give the immunity doctrine some genuine force and effect, it appears to me that a plaintiff should be required to make a stronger showing than the Court's opinion requires on the immunity question before being permitted to proceed to trial. I would hold that the plaintiff must establish after the completion of discovery and before the trial commences, not merely the existence of a genuine dispute as to some material issue of fact but also, by the preponderance of the evidence or through clear and convincing evidence, that the official failed to act with subjective or objective good faith. [*Halperin v. Kissinger, supra,* 606 F.2d at 1215 (Gesell, J., concurring).]

Following this suggestion, the trial judge would determine on the motion for summary judgment whether the credible evidence uncovered by the discovery process added up to a clear and convincing showing of malice or bad faith on the part of the defendant. To assure consistent application of this approach, and thus give practical effect to the principles enunciated in *Butz,* this Court could set forth a rule of law that where the plaintiff has not established after discovery a quantum of evidence sufficient (in view of immunity's purpose of avoiding a trial) to warrant putting the good faith issue to trial, the lower courts must grant summary judgment on the ground of qualified immunity.[18]

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[18] Consistent with the suggestion that plaintiff be required to establish a greater amount of credible evidence to overcome a summary judgment motion based on qualified immunity than he would have to establish for a normal summary judgment motion, the plaintiff should have the burden of persuasion in establishing the sufficiency of this evidence. While this Court has expressly decided that the defendant has the burden of pleading good faith when qualified immunity is raised as a defense, *see Gomez v. Toledo,* 446 U.S. 635 (1980), this Court has not answered the question of who must bear the ultimate burden of persuasion. The decisions of the courts of appeals are in conflict on this question. *Compare Gaffney v.*

(footnote continues)

Obviously, the required quantum of evidence is inherently not susceptible to abstract formulation. Nor is it impossible, on the other hand, to give it some concreteness. The trial courts can be instructed by the Court that they should, for example, take into account the "remoteness" of the actions of the defendants from the alleged constitutional tort. Trial judges should not, in other words, recognize as sufficient to raise a triable issue a connection between the two that is merely "thin," conjectural, or tangential. The weight and sufficiency of the evidence bearing on malice or bad faith should also be subject to close scrutiny. The trial courts might appropriately, at the same time, be encouraged to consider the nature and breadth of the defendant's official responsibilities and the availability of alternative remedies. Assessment of these factors would help make the "clear and convincing" requirement more concrete.

In taking these considerations into account, the trial courts would bring to bear in qualified immunity cases the same balancing approach discussed above in the context of absolute immunity.[19] The appropriateness of this approach is highlighted by the salient fact that the difference between situations calling for absolute immunity and those in which only qualified immunity is available are, on their face, differences of degree, not of kind. The gradations between the two types of immunity correspond with a continuum of public responsibilities requiring (to varying degrees) the protection of immunity. At one end are the "special functions," falling within the "exceptional

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(footnote continued)

Silk, 488 F.2d 1248, 1250-51 (1st Cir. 1973); *Skehan v. Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 61-62 (3d Cir.), *cert. denied*, 429 U.S. 979 (1976); *Douthit v. Jones*, 619 F.2d 527, 533 (5th Cir. 1980); *with McCray v. Burrell*, 516 F.2d 357, 370 (4th Cir. 1975), *cert. dismissed*, 426 U.S. 471 (1976); *Bogard v. Cook*, 586 F.2d 399, 412 (5th Cir. 1978), *cert. denied*, 444 U.S. 883 (1979); *Whitley v. Seibel*, 613 F.2d 682, 685 (7th Cir. 1980). At least one noted commentator has urged that the burden be put on the plaintiff, so as to provide "a necessary second level of protection for executive officials." Freed, "Executive Official Immunity for Constitutional Violations: An Analysis and a Critique," 72 Nw. U. L. Rev. 526, 562-63 (1978).

[19] *See* Point III, *supra*, at pp. 37-39.

situations where it is demonstrated that absolute immunity is essential to the conduct of the public business." *Butz v. Economou, supra,* 438 U.S. at 507. Ranged along the remainder of the continuum would be those officials who are entitled,

> in varying scope, [to] a qualified immunity ..., the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. [*Scheuer v. Rhodes, supra,* 416 U.S. at 247.]

Reference to the factors discussed above would give meaning to the "clear and convincing" requirement, assist the trial courts, and encourage a degree of uniformity and predictability that would give meaning to the defense of qualified immunity as envisioned in *Butz.*

D. Respondent Has Not Met This Higher Evidentiary Standard, and Petitioners Are Thus Entitled to Summary Judgment.

This case is precisely the kind of patently "insubstantial lawsuit" that would have been "quickly terminated" (*Butz v. Economou, supra,* 438 U.S. at 507) under the evidentiary standard suggested above.

As discovery is now complete, respondent has adduced all the evidence against petitioners he will be able to present at trial, and it is remarkably insignificant. Because the evidence is wholly circumstantial, respondent is forced to rely exclusively on inference and innuendo to make out his case. With respect to Harlow, the case is concocted from the mere fact that Harlow received three phone calls and had one "happenstance" meeting with Seamans, none of which indicate that Harlow played any role whatsoever in the Air Force's decision to terminate Fitzgerald's position. Indeed, respondent persists in his assertion that Harlow was responsible for what happened to Fitzgerald, notwithstanding that all the evidence actually points the other way: it is clear that Harlow, to the extent that he was concerned with the Fitzgerald matter at all, was *opposed* to the termination because of its potential for political repercussions

on Capitol Hill. There is no reason to doubt this fact, since Harlow's opposition is precisely what would be expected from one charged with maintaining harmonious Congressional relations.

Respondent's seven and a half-year search for evidence against Butterfield has been equally futile. Respondent's entire case against Butterfield is built on the fact that Butterfield made one telephone call and wrote one memorandum to his superior giving his recommendation (in admittedly pungent language) on the Fitzgerald matter. The telephone call and the memorandum were not initiated by Butterfield but were made in response to inquiries by his superior and the White House Press Office. Butterfield's responses came after the Air Force reorganization had been adopted and obviously could not have had any effect on that decision. Similarly, it is undisputed that his responses did not lead to any decision by the Pentagon or the White House not to rehire Fitzgerald: the Pentagon never knew about the telephone call and memorandum, and the White House, despite them, made a serious effort to find Fitzgerald another position.

Finally, it is easy to "reconcile the plaintiff's right to compensation" (*Butz v. Economou, supra,* 438 U.S. at 503) with the grant of immunity here, since respondent has successfully availed himself of the very remedy established by Congress to redress whatever injury he has suffered.

Consequently, the grant of qualified immunity to petitioners prior to trial is eminently warranted on this record under the approach suggested above. Clearly Fitzgerald has not shown by the preponderance of the evidence (much less by clear and convincing evidence) that Harlow or Butterfield was responsible for Fitzgerald's loss of employment or the failure to rehire. The remoteness of petitioners from the Air Force decision to reorganize, the "thin" and wholly circumstantial record in this case, the level and scope of petitioners' duties and responsibilities, and the availability of alternative remedies — all of which are relevant to respondent's evidentiary burden — require that summary judgment be granted.

To give meaning to the protection that qualified immunity was fashioned to afford, the Court should use this case to elaborate on its ruling in *Butz* and establish a legal standard for the granting of summary judgment motions on the ground of qualified immunity. Under this new standard, a defense of qualified immunity could be overcome only by plaintiff's adducing prior to trial the appropriate quantum of evidence. Such a rule not only would benefit both the lower courts and the federal officials who would be targets of suits similar to this one, but also would be a just and efficient way of reconciling the competing public policies favoring the unhampered functioning of government and the vindication of constitutional rights.

CONCLUSION

Petitioners respectfully ask that the district court's order denying petitioners' motion for summary judgment be reversed,[20] and that the district court be instructed either to (i) dismiss respondent's Second Amended Complaint with prejudice, on the ground that respondent has failed to state a claim for relief under the Constitution or federal statutes, or that petitioners are entitled to absolute immunity from any such claim by reason of their position and function as senior Presidential advisers, or (ii) enter judgment in favor of petitioners on the ground that they are entitled on this record as a matter of law to qualified immunity.

Respectfully submitted,

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[20] Reversal of the order of the district court, rather than the court of appeals, is proper here. The only question before this Court concerns the district court's denial of summary judgment, a question not reached by the court of appeals since it dismissed petitioners' appeal.

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Nos. 79-1738 and 80-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD NIXON,
Petitioner,

v.

A. ERNEST FITZGERALD,
Respondent.

BRYCE N. HARLOW and
ALEXANDER P. BUTTERFIELD,
Petitioners,

v.

A. ERNEST FITZGERALD,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS HARLOW AND BUTTERFIELD

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I. PETITIONER ADMITS THAT THE "BASIC FACTS" ARE NOT CONTROVERTED, AND BECLOUDS THE LEGAL ISSUES WITH IRRELEVANT ASSERTIONS.

As he has done during the course of this eight-year old lawsuit, respondent Fitzgerald has taken bits and pieces of evidence out of context in an attempt to obscure the legal issues and to argue the merits of his claim. The merits of his claim — that there was a far-flung conspiracy to oust him from his Air Force position — are not at issue in this appeal. Nevertheless, Fitzgerald attempts to show, for example, that he had an excellent record in the Air Force and that (despite the Civil Service Commission finding directly to the contrary) the Nixon administration retaliated against him for his Congressional testimony. Resp. Br. at 2-4.[1] These arguments totally miss the point. Even if it were true that the Air Force did indeed conspire against him and retaliate by eliminating his job, that would be wholly irrelevant to the claims of official immunity and the denial of the cause of action argued by petitioners Harlow and Butterfield.

Specifically, the facts of the case are irrelevant to petitioners' claim of absolute immunity, except insofar as they bear on the threshold requirement that petitioners did not act outside of the "outer perimeter of [their] line of duty." *Barr v. Matteo*, 360 U.S. 564, 575 (1959). Admittedly, however, the facts are relevant to petitioners' claim that on this record they are entitled to qualified immunity as a matter of law. But even here the only pertinent question is whether there exists any material issue of fact as to the absence of malice on petitioners' part.

Significantly, in the opening pages of his brief, Fitzgerald concedes the correctness of petitioners' position when he acknowledges that "[t]he basic facts of this case are not significantly controverted." Resp. Br. at 2. Since the "basic facts" he lists (*id.*) do not indicate liability on the part of petitioners Harlow and Butterfield, and since he offers no evidence that

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[1] This reply brief follows the citation form used in the Brief for Petitioners Harlow and Butterfield. *See* Pet. Br. at 1 n.1.

does indicate liability, respondent's comment amounts to an admission that petitioners' motion for summary judgment should have been granted, because there are no facts left to be determined at a trial.

In an attempt to show that petitioners' summary judgment motion should not have been granted, Fitzgerald is forced to ignore the following uncontroverted "basic facts":

1. Harlow never ordered, directed or approved that Fitzgerald be fired or that he not be rehired.

2. In response to inquiries from Secretary of the Air Force Seamans, Harlow merely said that Congressional relations would be adversely affected were Fitzgerald's job to be abolished.

3. Butterfield never had any contact with the Department of the Air Force, the Department of Defense or President Nixon with respect to the Fitzgerald matter. He became involved only *after* Fitzgerald's job had been eliminated.

4. Butterfield's involvement consisted of recommending to his immediate superior on two occasions, in response to inquiries, that Fitzgerald not be rehired. His advice, in any event, was evidently ignored, since White House officials did make a serious effort to find Fitzgerald another position.

Since, as further discussed below, there is no evidence either that petitioners had any part in the Air Force decision to eliminate respondent's job or that connects them with whatever injury Fitzgerald has suffered, it follows *a fortiori* that respondent's claim of malice or bad faith on their part is baseless.

The purpose of the following factual discussion is not to try the merits of the case, but simply to enable the Court to understand clearly the context in which it is considering the significant legal issues.

"Evidence" With Respect to Harlow.

Respondent has built his entire claim against Harlow on four brief conversations that the latter had with Air Force Secretary Seamans.[2] But in thousands of pages of depositions and exhibits there is not a speck of evidence to suggest that in any of these conversations Harlow in any way advised, approved or assisted in the elimination of Fitzgerald's job.[3] Respondent does not dispute that it was Seamans rather than

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[2] The first two conversations took place on May 9 and May 15, 1969. J.A. 150a-54a, 173a. The third and fourth conversations were held in November and December of 1969 (J.A. 157a-58a, 166a-68a), after Seamans' November 3 termination decision. J.A. 166a. It is undisputed that after the May 9 conversation, Harlow's aide Lamar Alexander counselled Seamans "not to [eliminate Fitzgerald's job] at that time." J.A. 152a. The second conversation took place at a White House breakfast for Congressmen. J.A. 113a-14a, 153a-54a, 162a-65a. Respondent insinuates that there must have been something incriminating in this conversation because it "was more than a 'happenstance' meeting" since "Seamans called [Harlow] out of a very important meeting to talk about the Fitzgerald matter." Resp. Br. at 5 n.7. First, the meeting was hardly "very important": as noted, it was a routine White House breakfast for Congressmen. J.A. 113a-14a, 163a. Second, Seamans' and Harlow's testimony that their meeting at breakfast was solely by "happenstance" is nowhere contradicted in the record. Even if their meeting was not by chance, there still is not a shred of evidence suggesting that Harlow approved, authorized, or gave instructions as to the Air Force's decision on Fitzgerald's job.

Respondent intimates that Harlow offered Seamans advice "'as to timing + how to proceed.'" Resp. Br. at 4. Respondent is quoting handwritten notes made by a White House staff member more than three years after the Harlow-Seamans conversation. The source of the information stated in the notes is unknown, and their author (David Wilson, a White House attorney) had no personal knowledge of the matter, since he did not even join the White House staff until 1971, two years after the conversation about which the notes were written. The unreliable nature of these notes was spelled out quite clearly in petitioners' Reply Brief (dated March 13, 1981) in response to respondent's Brief in Opposition to the *certiorari* petition (Pet. Rep. Br. at 5 & App. A), and it is surprising that respondent continues to rely on it here.

[3] This lack of evidence as to any involvement by Harlow in the decisions regarding Fitzgerald's job is entirely consistent with the fact that, as respondent himself admits, Harlow "had no regular involvement in executive department personnel decisions." Resp. Br. at 41. Indeed, respondent confirms Harlow's non-involvement when he quotes Harlow as testifying that "Mr. Fitzgerald was not my wicket. I was charged with other matters." *Id.*

Harlow who initiated all four conversations and that the third and fourth conversations took place *after* Seamans had already decided to discharge Fitzgerald. In fact, as respondent himself admits, the only "advice" that Harlow ever gave Seamans in any of the four conversations was that "the timing [of Fitzgerald's termination] was wrong." Resp. Br. at 5. On what theory, then, does respondent think Harlow liable? Apparently respondent hopes that a jury will be allowed to make the astounding leap from the fact of the conversations to conclude that because Harlow merely objected to the "timing" of the termination decision, and because he "did not advise Seamans to drop the idea" (*id.* at 5), Harlow must have actually participated in and approved the termination decision.

Respondent also points to the "fact" that Harlow discussed the Fitzgerald matter with President Nixon. *Id.* at 6. Neither Harlow nor President Nixon recalls any such conversation, and there is no record of it in any White House memoranda or presidential activity log. In fact, the only evidence about the alleged 1969 Nixon-Harlow conversation that Fitzgerald can find to support his case (apart from the confused and self-contradictory testimony of Clark Mollenhoff) is Nixon's later recollection that Harlow "was all for canning" Fitzgerald. *Id.* But this quotation appears to support Fitzgerald's case only because he has completely wrenched it out of context. The full exchange is:

> Nixon: Bryce was all for canning him, wasn't he?
>
> Ziegler: No, I think Bryce may have been the other way. [J.A. at 284a.]

Respondent would have a jury conclude from this conversation, which occurred more than three years after both the alleged Nixon-Harlow conversation and Fitzgerald's termination, that Harlow played a part in some ill-defined "conspiracy" to discharge Fitzgerald.

"Evidence" With Respect to Butterfield.

The "evidence" against Butterfield is equally sparse. Respondent has based his entire case against Butterfield on a single telephone conversation and a single memorandum in which Butterfield urged that the administration let respondent "bleed." But it is irrefutable that both the telephone conversation and the sending of the memorandum did not take place until January of 1970, so that there is no question but that they did not in any way contribute to the Air Force's November 1969 decision to eliminate Fitzgerald's position. They also could not possibly have had any causal impact on the asserted failure to rehire Fitzgerald, because it is undisputed that Butterfield's recommendations were never communicated to the Air Force or Defense Departments, and that the White House's unsuccessful efforts to find Fitzgerald another job continued after Butterfield's recommendations were expressed. Without some showing of a causal relationship, an "affirmative link" between Butterfield's telephone call and memorandum and respondent's allegedly wrongful discharge, no jury could permissibly find Butterfield to be liable. *See Rizzo v. Goode,* 423 U.S. 362, 371 (1976) ("affirmative link" between third party's misconduct and defendant's acts must be shown in conspiracy cases); *Henzel v. Gerstein,* 608 F.2d 654, 659 (5th Cir. 1979) (conspiracy allegations that are "wholly conclusory and unsupported . . . cannot withstand a motion for summary judgment").

II. PETITIONERS HARLOW AND BUTTERFIELD WERE ACTING SQUARELY WITHIN THE SCOPE OF THEIR AUTHORITY AND MAY THUS AVAIL THEMSELVES OF ABSOLUTE OR QUALIFIED IMMUNITY.

One of respondent's ways of addressing petitioners' reasoned arguments is to misapprehend the arguments and to restate them in a sufficiently hyperbolic way so that the reader would presumably be repelled by the exaggerated statement. To illustrate, respondent claims that "petitioners Harlow and Butterfield . . . argue that they should be absolutely immune not merely in the traditional sense . . . but rather *for all actions*

while in office." Resp. Br. at 36 (emphasis added). Respondent shrilly warns that "under the doctrine advanced by petitioners, there would be no limit." *Id.* at 37. This is totally untrue. Petitioners expressly acknowledged in their brief (at p. 37) that any form of official immunity that would be accorded them would require that they have been acting "within the outer perimeters of [their] line of duty." *Barr v. Matteo,* 360 U.S. 564, 575 (1959).

Respondent further claims that Harlow and Butterfield were acting outside "the scope of their authority" (Resp. Br. at 34-37, 40-41), by which respondent evidently is referring to the *Barr v. Matteo* "perimeter" test. *Id.* at 41. Harlow and Butterfield were both senior White House advisers, charged in this case with allegedly giving advice and counsel concerning Fitzgerald's discharge. Fitzgerald therefore is asking this Court to hold that senior White House advisers, by giving advice and counsel concerning a matter that had come to their attention, were acting outside "the outer perimeter" of their responsibilities. *Id.* at 35. The absurdity of this proposition is clear. Not only did the Fitzgerald matter fall within "the outer perimeter" of Harlow's and Butterfield's responsibilities, but it also fell squarely within the scope of their daily duties. All senior White House aides are charged with giving their advice and counsel to the President, members of the White House staff, and the executive departments on matters that come to their attention. Harlow was approached by Seamans because Seamans knew that Fitzgerald had become the object of several Congressmen's attention. It was unquestionably Harlow's responsibility to monitor and give advice on matters of Congressional concern and to respond to requests for political assessments — such as whether the firing of an Air Force employee would cause trouble on Capitol Hill.

Butterfield first became involved with the Fitzgerald matter in response to a direct request from his superior to look into Fitzgerald's job status. *See* Pet. Br. at 7-8. It is difficult to conceive of an act that could fall more completely within the scope of one's duties than a recommendation stemming from a direct request of one's superior. Butterfield's recommendation

to his immediate superior — that Fitzgerald not be rehired — was entirely in keeping with White House staff practice and Butterfield's own relationship with his superior, which allowed him full authority to make recommendations on matters brought to his attention.[4] *See* Nixon Dep. I (R. 378) 366-67; Butterfield Dep. (R. 42) 127-30, 134, 137 (J.A. 99a, 100a).

Moreover, the fact that petitioners are alleged to have participated in a constitutional tort, which by definition must have been unauthorized, does not itself compel a denial of immunity. This Court has previously quoted Judge Learned Hand in recognizing the speciousness of such an argument:

> The [court] decisions [on immunity] have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. [*Barr v. Matteo, supra,* 360 U.S. at 572, *quoting Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied,* 339 U.S. 949 (1950).]

Thus, even under a charitable view of plaintiff's allegations, it is clear that Harlow and Butterfield were acting entirely within the scope of their authority.

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[4] Respondent's only "evidence" to support his assertion that Butterfield was acting outside the scope of his authority consists of some statements drawn from a 1973 interview given by Butterfield to journalist Vera Glasser. *See* Resp. Br. at 8-9 n.13. Butterfield's comments belittling his role in the Fitzgerald matter were directed to the point that Butterfield was not normally asked by his superior to get involved in Pentagon personnel decisions. But that does not in any way mean that he was acting outside of the scope of his authority — he was simply expressing his recommendation to his superior on a matter that his superior had asked him to look into.

III. PUBLIC POLICY DEMANDS THAT SENIOR PRESIDENTIAL ADVISERS BE ACCORDED ABSOLUTE IMMUNITY.

Respondent rejects Harlow's and Butterfield's claim to absolute immunity with the cavalier assertion that a President and his senior aides will not be "cowed" by the fear of financial ruin and burdens of litigation that the threat of damage actions necessarily represents. Resp. Br. at 31. In making this assertion, respondent would have this Court ignore its many decisions that recognize the reality of the fears that damage suits can pose, as well as the debilitating impact on the administration of government that those fears can have when they distort the decisions that Presidents and their senior advisers must make. "It simply defies logic and common experience to suggest that officials will not have [the fear of litigation and liability] in the back of their minds when considering what official course to pursue." *Butz v. Economou*, 438 U.S. 478, 526-27 (1978) (Rehnquist, J., concurring and dissenting in part).

Respondent apparently believes, nevertheless, that petitioners have not presented sufficient evidence to demonstrate that the threat of lawsuits would inhibit the actions and distort the decisions that senior White House advisers must make on matters of great public importance each day. Resp. Br. at 26, 31. It is difficult to see what kind of "evidence" respondent would recognize as sufficient. Presumably respondent would not be willing to acknowledge the correctness of according absolute immunity to the judge in *Stump v. Sparkman*, 435 U.S. 349 (1978), unless the judge had announced that he would have ruled differently had he feared an ensuing lawsuit. But as this Court has recognized many times, it is common sense that tells one that, for example, Judge Sparkman's daily decisions would in fact have been influenced by the fear of liability, even if one cannot find a hard piece of evidence that explicitly demonstrates that fact. The fear of liability would have no less of a distorting effect on the recommendations and decisions that Harlow, Butterfield, and other senior White House advisers in

every administration are daily called upon to make in the course of conducting the nation's business.[5]

Indeed, as respondent himself recognizes, it is the need to permit judges, prosecutors, and legislators to govern fearlessly and vigorously, uninfluenced by "the hazards and distractions of collateral civil liability," that provides the basis for extending absolute immunity to those officials. Resp. Br. at 23. The same rationale necessitates extending absolute immunity to senior White House advisers like Harlow and Butterfield, in order that they may vigorously discharge their public duties, rather than govern with one eye on the consequences that each important decision might have on their own personal finances. Qualified immunity has proven in practice to provide insufficient protection to quell the debilitating fear of liability, because the lower federal courts routinely force officials in the same position as petitioners here to face "the burden of a trial and ... the inevitable danger of its outcome". *Gregoire v. Biddle, supra,* 177 F.2d at 581. *See generally* Pet. Br. at 34-35, 40-43.

In yet another mischaracterization, respondent asserts that Harlow and Butterfield are claiming immunity solely on the basis of their rank. Resp. Br. at 23. That is simply untrue. Petitioners agree with respondent that absolute immunity is not just "a privilege of rank or a badge of high office." *Id. See* Pet. Br. at 26. They also agree that the right to absolute immunity depends on the nature of an official's *functions* and whether the

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[5] At Congressional hearings in November 1981 on bills that would make the United States Government the sole defendant (to the exclusion of individual federal officials) in cases involving constitutional torts, the Department of Justice noted that there were over 2,000 such cases (some of which involved multiple defendants) then pending against federal officials: "*Bivens* actions have subjected countless federal employees to vexatious litigation *and encouraged a timid discharge of official duties* because of the fear of lawsuits." Statement of Deputy Attorney General Edward G. Schmults before the Subcommittee on Administrative Law and Government Relations of the House Committee on the Judiciary at pp. 3-4 (Oct. 13, 1981) (emphasis added). *Accord,* Griffin Bell, *Proposed Amendments to the Federal Tort Claims Act,* 16 Harv. J. on Legislation 1,6 (1979). *See generally* H.R. 24 and S. 1775, 97th Cong., 1st Sess. (1981).

adequate performance of those functions demands the protection that absolute immunity provides. As was amply discussed in their brief (and thus need not be reiterated here), Harlow and Butterfield plainly performed functions that demand the protection of absolute immunity. *See* Pet. Br. at 31-33. Respondent offers no rebuttal to that discussion. Instead, he is reduced to making sweeping, conclusory assertions. After quoting Justice Frankfurter in *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951), to the effect that Congressmen performing legislative duties are immune "not for their private indulgence but for the public good," respondent states that "[n]o similar rationale can justify a grant of *ex officio* absolute immunity to an executive official, whether state or federal." Resp. Br. at 23-24. As demonstrated in petitioners' brief (at pp. 26-28) and as recognized by this Court in numerous immunity cases, there is indeed a similar rationale — the "constant dread of retaliation" will affect official decison-making — that justifies granting absolute immunity to those whose functions require such protection. *See Gregoire v. Biddle, supra,* 177 F.2d at 581. Unless this Court is willing to countenance the prospect that the judgment of senior Presidential advisers may inadvertently be distorted by fear of their own potential liability, then it should hold that petitioners here perform functions that necessitate the protection of absolute immunity.

Respondent claims, however, that it would be anomalous to hold that the facts of this case present an "exceptional situation" under *Butz v. Economou* for which absolute immunity is essential, since (according to respondent) this Court evidently did not view the disturbance at Kent State University as presenting an "exceptional situation" warranting absolute immunity for the govenor of Ohio. Resp. Br. at 25. *See Scheuer v. Rhodes,* 416 U.S. 232 (1974). Once again, respondent's line of argument reflects a misapprehension of petitioners' position. Petitioners have proposed a balancing test that would attempt to reconcile the official's need for the protection of absolute immunity with the extent to which absolute immunity would leave unredressed a substantial constitutional injury. Pet. Br. at 37-39. From a functional viewpoint, Governor

Rhodes may have had as great a need for absolute immunity's protection as petitioners here, but certainly the degree of the injury and the extent to which the plaintiffs could redress it through means other than a private damages action were far different in the two cases. The deaths that were the subject of *Scheuer* were obviously at the opposite end of the injury scale from the adverse personnel decision suffered by Fitzgerald. Most significantly, the *Scheuer* plaintiffs had no other means to remedy their injury other than by an action for damages. For them, as for Mr. Bivens, "it is damages or nothing." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra,* 403 U.S. at 410 (Harlan, J., concurring in the judgment). Clearly that is not the case for Fitzgerald.

Respondent also claims that Harlow's and Butterfield's claim to derivative absolute immunity "amounts to suggesting" that senior White House advisers enjoy absolute immunity but that those who hold "the greater responsibilities of a Cabinet office" do not. Resp. Br. at 25. Petitioners "suggest" nothing of the sort. First, it is not clear that Cabinet officers exercise "greater responsibilities." In view of the difficult duties of a senior Presidential adviser (as explained in petitioners' brief at pp. 31-32), it might well be that, for example, today's Edwin Meese or James Baker has "greater responsibilities" than John Block, one of whose predecessors as Secretary of Agriculture was denied absolute immunity in *Butz v. Economou.*[6] Second,

[6] In any event, although the Court need not reach the issue here, it may well be that some Cabinet officers are, depending upon their functions, entitled to absolute immunity. Indeed, they may even be derivatively entitled to absolute presidential immunity to the extent that they are discharging their constitutional duties to advise the President (as where, for example, the Attorney General advises on the legality of a Presidential action). *See* U.S. Const. art. II, §2. As this Court has noted in other contexts, there are similar constitutional underpinnings in the case of Presidential advisers:

> [There is a] necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking .... [T]hose who assist [the President] must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. *These ... considerations*

(footnote continues)

what petitioners do suggest is that because the President cannot act without the help of others, it would mean very little for the President to be given absolute immunity to permit him to discharge *his* duties fearlessly and vigorously if his closest aides are afraid to advise him fearlessly and to carry out his orders vigorously. *See* Pet. Br. at 28-30.

IV. HARLOW'S AND BUTTERFIELD'S INVOLVEMENT WITH THE FITZGERALD MATTER WAS TOO TANGENTIAL TO WARRANT GOING TO A JURY.

As demonstrated by the inferences, conjecture, and speculation that comprise respondent's brief, this very case itself shows how an ingenious plaintiff can concoct a barely plausible theory of causality and liability that forces a trial judge under normal summary judgment rules to let the case go to the jury. *See* Pet. Br. at 43-44. The simple fact is that after protracted litigation, including the taking of many depositions and the production of thousands of pages of documents, respondent has been unable to uncover a shred of evidence to show that Harlow or Butterfield ever participated in or approved the decision to eliminate his job, or that they ever frustrated his rehiring. It was precisely this kind of patently "insubstantial lawsuit" that this Court said should be "quickly terminated" on a motion for summary judgment when the defense of qualified immunity is raised. *Butz v. Economou, supra,* 438 U.S. at 507. Respondent concedes that damages actions against a defendant for injuries in which the defendant played only a "tangential" role should not survive to trial. Resp. Br. at 27.

(footnote continued)

> . . . [*are*] *fundamental to the operation of Government and* [*are*] *inextricably rooted in the separation of powers under the Constitution.* [*United States v. Nixon,* 418 U.S. 683, 705-06, 708 (1974) (emphasis added) (privilege for confidential Presidential communications is subordinate only to specific need in criminal prosecution.]

Respondent has little to say about petitioners' contentions that qualified immunity as envisioned in *Butz* has not proven "workable," and that a higher evidentiary burden should therefore have been required to defeat petitioners' motion for summary judgment on the ground of qualified immunity.[7] *See* Resp. Br. at 30 n.39. *See generally* Pet. Br. at 40-49. Presumably, respondent's relative silence reflects his recognition that he could not possibly meet such a burden. In lieu of the normal summary judgment standard, petitioners have advanced Judge Gesell's suggestion that "the plaintiff must establish after the completion of discovery and before the trial commences, . . . by the preponderance of the evidence or through clear and convincing evidence, that the official failed to act with subjective or objective good faith." Pet. Br. at 45. *See Halperin v. Kissinger*, 606 F.2d 1192, 1215 (D.C. Cir. 1979), *aff'd by an equally divided court*, 452 U.S. — (June 22, 1981) (Gesell, J., concurring). Respondent's only comment is that "[s]erious seventh amendment problems would be raised by the application of a higher evidentiary standard at the pretrial stage than at a jury trial." Resp. Br. at 30 n.39. But there would be no seventh amendment problems because the same evidentiary standard ("preponderance" or "clear and convincing") would be used at the jury stage. No one — petitioners or respondent — has suggested that any *lower* standard be employed at the jury stage.

If petitioners can be forced to trial on as meager a record as this one, the protection that the qualified immunity doctrine was fashioned to afford will be entirely eviscerated. No senior presidential adviser would then ever be able to govern without fear of litigious harassment and financial ruin, because a person aggrieved by a decision in which the adviser might have had some fleeting involvement would often be able to construct

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[7] Respondent claims that this Court may not review the district court's denial of summary judgment on the ground of qualified immunity because the denial was not (according to the respondent) an immediately appealable collateral order. *See* Resp. Br. at 29 n.38. As noted in petitioners' brief (at pp. 20-21 & nn.6 & 7), since the purpose of qualified immunity is (among other things) to avoid a trial on the merits, it should be no less appealable than a denial of absolute immunity. In any event, since the absolute and qualified immunity issues are so interrelated, petitioners respectfully urge this Court, in conformity with its past practice, to consider both issues together. *See Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940).

some theory of liability just as Fitzgerald has done in this case. To prevent the debilitating impact that such a result would have on the administration of government, it should be recognized that the lower courts have in practice been unable to heed this Court's admonition to "weed out insubstantial claims." *Butz v. Economou, supra,* 438 U.S. at 527. Therefore, if petitioners are not held to be entitled to absolute immunity, they respectfully urge this Court to clarify the standards under which summary judgment should be granted and thus give meaning to the defense of qualified immunity.

V. BECAUSE RESPONDENT HAS ALREADY AVAILED HIMSELF OF HIS CIVIL SERVICE REMEDY, THE ADDITIONAL REMEDIES OF IMPLIED CONSTITUTIONAL AND STATUTORY CAUSES OF ACTION ARE UNNECESSARY.

In response to petitioners' argument that respondent is not entitled to the extraordinary remedy of an implied private damages action in addition to his civil service statutory remedies,[8] respondent states that "[e]xecutive discretion in the

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[8] Respondent suggests that the cause of action issue is not properly before the Court, because it was not collaterally appealable. Resp. Br. at 42. For the reasons stated in their brief (at p. 21 n.8), petitioners believe that the cause of action question is now appealable because it is completely intertwined with the immunity issues. There is nothing to prohibit this Court from considering all these interrelated issues together. *See Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940). Petitioners did not include the cause of action issue in their notices of appeal to the court of appeals because it was not clear at the time in the District of Columbia Circuit that the issue was immediately appealable. However, in a recent immunity case the D.C. Circuit indicated that the question of the existence of a private cause of action for constitutional torts can be immediately appealed in conjunction with an appeal of a denial of absolute immunity:

> Although the District Court's disposition of [the cause of action question] was not a final judgment, [it] nevertheless might be made the subject of review in conjunction with our review of defendants' appeal from the collateral order denying absolute immunity. *See IBM v. Levin*, 579 F.2d 271, 278 (3d Cir. 1978); *Hysell v. Iowa Pub. Serv. Co.*, 559 F.2d 468 (8th Cir. 1977); *Deckert v. Independence Corp.*, 311 U.S. 282 (1940). [*Dellums v. Powell*, No. 80-1331, slip op. at 5 n.6 (D.C. Cir. July 24, 1981).]

(footnote continues)

personnel area is broad, but it is not unreviewable." Resp. Br. at 44. Respondent has, once again, missed the point. The issue is not whether executive decision-making in personnel matters is judicially reviewable — of course it is. There are elaborate statutory safeguards protecting the rights of civil servants such as Fitzgerald, and, as he himself has demonstrated several times, decisions made under that statutory scheme are reviewable by the courts. *See* Pet. Br. at 11 n.4 & 24 n.10. Rather, the issue is whether there should be an *additional judicial remedy* allowing him to seek damages from private individuals. Respondent offers no convincing reason why inference of a private cause of action is necessary.

Respondent acknowledges that he would have no implied private action under the First Amendment if there were "special factors counselling hesitation" in inferring such a remedy. Resp. Br. at 42-43. *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971); *Carlson v. Green*, 446 U.S. 14, 18 (1980). But he denies that this case presents such "special factors." Admittedly, Congress has not "explicitly declared" that the elaborate panoply of Civil Service remedies (which Fitzgerald actively and successfully pursued) are "a *substitute* for recovery directly under the Constitution." *See Carlson v. Green, supra*, 446 U.S. at 18 (emphasis in original). But in view of the full remedial scheme available to civil servants such as respondent, petitioners respectfully urge this Court to refrain from sanctioning judicial intrusion into the employer-employee relationship between the federal government and its civil servants. Such intrusion would, as the Fifth Circuit recently held in a case very similar to Fitzgerald's, "tend to interfere with and undermine the traditional control of the Government over its internal and personnel affairs." *Bush v. Lucas*, 647 F.2d 573, 577 (5th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3176 (U.S. Sept. 4, 1981) (No. 81-469). The only way to avoid that intrusion in cases

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(footnote continued)

Since the issue was briefed in the trial court, was noted in petitioners' *certiorari* petition (at p. 14 n.9), is now squarely presented, and is "fairly comprised" by the Questions Presented (*see* Sup. Ct. R. 21.1(a)), petitioners respectfully urge the Court to consider the cause of action issue.

such as this is to withhold the plaintiff's constitutional cause of action altogether, and remit him to his Civil Service remedy.

In an attempt to eliminate the adverse impact of *Bush v. Lucas,* respondent claims that the case was just "wrongly decided" or that it is "distinguishable from [respondent's] case, since Congress had not expressly prohibited the conduct challenged" in *Bush.* Resp. Br. at 44. But that reasoning is illogical: if anything, the fact that Congress had not made available statutory remedies and sanctions for a constitutional tort (as respondent claims was true in the *Bush* case) should have given added reason to infer a private remedy for that tort. But since the *Bush* court refused to infer such a remedy under those circumstances, *a fortiori* a private remedy should not be inferred where (as in Fitzgerald's case) Congress has already provided additional statutory remedies. *See generally* Brief for the Respondent in Opposition at 6-12, *Bush v. Lucas, petition for cert. filed,* 50 U.S.L.W. 3176 (U.S. Sept. 4, 1981) (No. 81-469).

Respondent's attempt to assert private statutory causes of action is even more misguided. He claims, without any supporting citation whatsoever, that "Congress apparently intended that a private right of action should be available to vindicate federal employees' rights in the face of official retaliation for congressional testimony." Resp. Br. at 43. Respondent relies on two statutes: one that makes it a felony to injure a Congressional witness (18 U.S.C. §1505), and another that gives civil servants the right to petition Congress (5 U.S.C. §7211). Only one sentence in his entire brief is offered in support of the creation of a cause of action under 18 U.S.C. §1505. The sentence states that the *other* statute (5 U.S.C. §7211) "provides a context that justifies implying a private right of action" under the penal statute. Resp. Br. at 47. The basis of his right to sue, then, must be in §7211. But Fitzgerald admits that §7211 does not directly provide for a private right of action. Indeed, he even expressly admits that the subject of a private right of action was not once "discussed in its legislative history." *Id.* at 44-45. Respondent briefly reviews the legislative history of §7211 and the general statutory scheme; the best he can offer is the contention that the circumstances surround-

ing the enactment of §7211 "strongly suggest that congressional silence concerning a private cause of action should not be construed to deny its existence," and that the subsequent enactment of additional remedies need not necessarily preclude implication of a cause of action. *Id.* at 46-47. However, as noted in petitioners' brief (at pp. 25-26 n.11), the circumstances surrounding enactment of §7211 in 1912 and the subsequent elaboration of remedies make clear that, at least in this instance, Congressional silence actually does bespeak an intent that there be no private cause of action. Without any precedential basis or even inferential support, respondent is essentially asking this Court to indulge in the fiction of uncovering a 69-year old Congressional intent to authorize private damages actions for violations of §7211. There are neither legal nor policy reasons for doing so. In short, respondent's conclusory contentions notwithstanding, there is simply no evidence that Congress intended to provide any remedy other than the Civil Service remedy available for violation of 5 U.S.C. §7211, and the penal sanction available for violation of 18 U.S.C. §1505.

CONCLUSION

The district court's denial of petitioners' motion for summary judgment should be reversed.

Respectfully submitted,

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